STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Court of Appeals)
[Kirsten Frank Kelly, P.J., Jansen, Donofrio, JJ.]

RALPH ORMSBY and **KIMBERLY ORMSBY,**
husband and wife,

Plaintiff-Appellees,

-v-

CAPITAL WELDING, INC., an Ohio corporation,
and **MONARCH BUILDING SERVICES, INC.,**
an Ohio corporation,

Defendant-Appellants,

Supreme Court Nos. 123287; 123289
Court of Appeals No. 233563
Oakland Circuit No. 98-008-608 NO

-and-

STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Court of Appeals)
[Fitzgerald, P.J., Holbrook, Jr., Cavanaugh, JJ.]

ROBERT F. DESHAMBO,

Plaintiff-Appellee,

-and-

ATTORNEY GENERAL, DEPARTMENT OF COMMUNITY HEALTH, and **STATE OF MICHIGAN,**

Plaintiff-Intervenor-Appellees,

-v-

CHARLES W. ANDERSON,

Defendant,

-and-

NORMAN R. NIELSEN and
PAULINE NIELSEN,

Defendant-Appellants.

Supreme Court Nos. 122939, 122940
Court of Appeals Nos. 233853, 233854
Leelenau Circuit No. 00-005-127 NO

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MEMORANDUM OF LAW OF *AMICI*
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL, & REINFORCING IRON WORKERS
IN SUPPORT OF PLAINTIFF-APPELLEES

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The *Amici* I.A.B.S.O. & R.I.W. Answers, "Yes."

I. INTRODUCTION

These consolidated cases fall within that area of tort law known as "the law of principals employing contractors." By *principal* the common law refers to the "principal employer," *Honeywell & Stein, Ltd v Larkin Bros Ltd,* [1934], 1 KB 191, 201, and the author of the enterprise undertaken or the works to be constructed, *Gray v Pullen,* [1864], 5 B & S 970, 984; *see also, Feyers v United States,* 561 F Supp 362, 368 (ED Mich 1983)(applying Michigan law)("owner or principal"), *vacated on other grounds,* 749 F2d 1222 (6th Cir 1984), *cert denied,* 471 US 1125, 105 S.Ct. 2655, 86 L.Ed.2d 272 (1985). The term *principal* is preferable, because other terms such as "owner," "occupier," or "general contractor" are freighted with meaning unique to the law of premises liability, whereas in this branch of the law, the duties which devolve upon the putative defendants are defined by the contractual relationships between, or among, the parties.[1] M. Schneier, *Construction Accident Law* (American Bar Association, 1999), p. 60: "The term 'principal' describes the hirer of an independent contractor. A principal may be either an owner or a general contractor (or a subcontractor who hires a sub-subcontractor....)."

Moreover, as a practical matter, a project owner[2] can be both the owner of property in fee simple *and* act as its own general contractor[3], utilizing its own employees for some phases of the work, directly employing other outside contractors to perform other phases of the work, and

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[1] *Kuhn v PJ Carlin Constr Co,* 154 Misc 892; 278 NYS 635, 644 (1935), *aff'd,* 248 App Div 582; 288 NYS 1110 (1936), *reversed on other grounds,* 274 NY 118; 8 NE2d 300 (1937).

[2] *Means Illustrated Construction Dictionary* (Smit & Chandler eds. 1991), p. 397: " **owner** The owner of a project, that is also party to the owner-contractor and owner-designer agreements." Occasionally, real estate developers, who are not owners in fee simple, nonetheless, fall within this definition.

[3] *Means Illustrated Construction Dictionary, supra,* p. 251: "**general contractor** For an inclusive construction project, the primary contractor who oversees and is responsible for all the work performed on the site, and to whom any subcontractors on the site are responsible."

providing overall job superintendence. By the same token, a general contractor may act as a construction manager[4], providing job superintendence, contract administration, and safety supervision and, yet, have no field forces of its own performing any of the actual construction work. In the construction industry, there are actually two kinds of construction managers: (a) the "at risk" construction manager, who has a financial stake in the project, and is a quasi-owner; and (b) the "plain vanilla" construction manager who is engaged in contract administration.

At the same time, an architect, or architect-engineer, may be a vice-principal in the prosecution of the work, acting as the owner's agent, participating in the selection and employment of the contractors, or exercising control over the methods, manner and means employed by the craft contractors engaged in the actual performance of the work.[5] Finally, prime contractors[6] may be principals, when they employ subcontractors.

The modern construction industry in the United States admits of many variations and permutations of these relationships, necessary to the completion of various projects, such that terms of legal art, which were formerly adequate when defining the parameters of the common

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[4] *Means Illustrated Construction Dictionary, supra*, p. 137: "**construction manager** One who directs the process of construction, either as the agent of the owner, as the agent of the contractor, or as one who, for a fee, directs and coordinates construction activity under separate or multiple prime contracts." *Cf. Id.*: "**constructor** One who is in the business of managing the construction process. A contractor is a constructor who is acting under the terms of a contract for construction." Recently, the Court of Appeals held that there is no analytical difference between a "construction manager" and a "general contractor" for purposes of determining liability under *Funk v General Motors Corp,* 392 Mich 91; 220 NW2d 641 (1974). *See, Berry v Barton Malow Co,* 2003 Mich App LEXIS 1741 (July 22, 2003) (*per curiam*).

[5] *See, e.g.*: *United States v Rogers,* 161 F Supp 132, 136 (S D Calif 1958); *Day v National U S Radiator Corp,* 241 La 288; 128 So2d 660 (1961); *Miller v DeWitt,* 37 Ill 2d 273; 226 NE2d 630 (1967); K Carey, *Assessing Liability of Architects and Engineers for Construction Supervision,* 1979 Ins L J 147 (1979); J Sweet, *Site Architects and Construction Workers: Brothers and Keepers or Strangers?* 28 Emory L J 291 (1979).

[6] *Means Illustrated Construction Dictionary, supra,* p 441: "**prime contractor** Any contractor on a project having a contract directly with the owner."

law duties of these actors when harm befalls another, no longer keep pace with the economic realities of the present-day construction industry. Economics have simply out-paced classical legal terminology; and, perhaps, classical legal analysis.

Since the landmark case of *Laugher v Pointer,* [1826], 5 Barn & Cress 547; 108 Engl Rpts, the overarching proposition of law, in this area of torts, is that one who employs an independent contractor to do work is not liable for the negligence of the contractor, nor for the negligence of an employee of that contractor, in the prosecution of the work. 2 *Restatement of Torts2d* (1965), §409, p. 370. Michigan first adopted this rule of law in *DeForest v Wright,* 2 Mich 368 (1852).

At the same time, this Court almost immediately began carving out exceptions to the rule. *See, Moore v Sanborne,* 2 Mich 519, 529 (1853). Indeed, so many exceptions have been carved out that, in the oft-quoted words of Chief Justice Gallagher in *Pacific Fire Ins Co v Kenney Boiler & Mfg Co,* 201 Minn 500, 503; 277 NW 226 (1937), "the rule is now primarily important as a preamble to the catalog of its exceptions." *See also, Knickerbocker Bldg Services, Inc v Phillips,* 20 Ohio App 3rd 158, 160; 485 NE2d 260 (1984) ("riddled with exceptions *Funk v General Motors Corp,* 392 Mich 91, 101; 220 NW2d 641 (1974) (a "rule distinguished by the variety of its exceptions" [footnote omitted]); *Walker v Capistano Saddle Club,* 12 Cal App 3rd 894, 896; 90 Cal Rptr 912, 914 (1970); *Summers v Crown Constr Co,* 453 F2d 998, 999 (4th Cir 1972). *See also, 2 Restatement of Torts 2d, supra,* § 409, Comment *b.*, pp 370-371; H Philo, *Revoke the Legal License to Kill Construction Workers*, 19 De Paul L Rev 1, 5 (1969); H Philo & R Steinberg, *A Partial Revocation of the Legal License to Kill Construction Workers* 15 *Trial* 24 (June, 1979).

The common law recognizes at least 15 exceptions to the so-called "general rule"

granting immunity to the principal who employs a so-called "independent contractor:[7]"

(1) negligent selection or furnishing an unsafe site, *see, e.g., McCord v U S Gypsum Co,* 5 Mich App 126; 145 NW2d 841 (1966), *lv denied,* 379 Mich 759 (1967); *Coughtry v Globe Woolen Co*, 56 NY 124; 15 Am Rpts 387 (1874); *Curley v Harris*, 93 Mass (11 Allen) 112 (1865); *Cliburn v Jett Drilling Co,* 318 F2d 443, 446 (5th Cir 1963); *Whatley v Delta Brokerage & Warehouse Co,* 248 Miss 416; 159 So2d 634, 636 (1964); *Ray v McDermott, Inc,* 492 So2d 83, 85 (La App 1986);

(2) negligent selection or employment or retention of a careless, unsafe, or incompetent contractor, *see, e.g., 2 Restatement of Torts 2d, supra,* § 411, p 376; *Erickson v Pure Oil Corp,* 72 Mich App 330, 338; 249 NW2d 173 (1976), *lv denied,* 400 Mich 859; 256 NW2d 574 (1977); *Ormsby v Capital Welding, Inc,* 255 Mich App 165, 178; 660 NW2d 602 (2003); *but see, Reeves v K-Mart Corp,* 229 Mich App 466; 582 NW2d 841 (1988), *lv denied,* 459 Mich 976; 593 NW2d 548 (1999);

(3) negligently retaining control over the conduct of the work, *see, e.g., 2 Restatement of Torts 2d, supra* § 414, p 387; *Warren v McLouth Steel Corp,* 111 Mich App 496; 314 NW2d 666 (1981), *lv denied,* 417 Mich 941 (1982); *Signs Admx v Detroit Edison Co*, 93 Mich App 626; 287 NW2d 292 (1979), *lv denied*, 411 Mich 870 (1981);

(4) interference in the conduct of the work, *see, e.g., W D Kelley & Sons v Howell*, 41 Ohio St. 438, 442-443 (1884); *Faren v Sellers & Co*, 39 La 1011; 3 So 363 (1887);

(5) negligently exercising control not retained by contract, *see, e.g., Peter v Public Constructors, Inc,* 368 F2d 111, 113 (3rd Cir 1966);

(6) inherently ultrahazardous work for which there is absolute liability, regardless of the degree of care exercised, *see, e.g., Moran v Pittsburgh-Des Moines Steel Co,* 166 F2d 908, 914 (3rd Cir 1948);

(7) inherently dangerous work, *see, e.g., 2 Restatement of Torts 2d, supra,* §§ 413, 416, 427; *Bower v Peate*, [1876], 1 QBD 321; *Bosak v Hutchinson,* 422 Mich 712; 375 NW2d 333 (1985); *Vannoy v City of Warren,* 15 Mich App 158; 166 NW2d 486 (1968), *lv denied,* 382 Mich 768 (1969);

(8) violation of a duty made nondelegable by statute or by common law, *see, e.g., Davie v New Merton Board Mills, Ltd,* [1959] A.C. 604, 1 All Engl Rpts 346, 348; *Peerless Mfg Co v Bagley,* 126 Mich 225; 85 NW 568 (1901); *Pusey, Exr v Bator,* 94 Ohio St 3rd 275; 762 NE2d 968, 972-973 (2002);

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[7] Jacobs, "*Are Independent Contractors Really Independent?*", 3 DePaul L. Rev. 23 (1953).

(9) violation of a duty which is made nondelegable by contract, *see, e.g.*: *Eischeid v Dover Constr, Inc,* 217 FRD 448, 463-465 (ND Iowa 2003); *Pusey, Exr v Bator, supra,* at *Id.*;

(10) work which constitutes a trespass or nuisance or which is illegal, *see, e.g., 2 Restatement of Torts 2d, supra,* § 427B, p 419; *South Carolina Natural Gas Co v Phillips,* 289 F2d 143, 150 (4th Cir 1961); *Schoenherr v Stuart Frankel Development Co,* ___ Mich App ___; ___ NW2d ___ (2003) (*per curiam*), *held in abeyance,* 2004 Mich LEXIS 209 (January 27, 2004).

(11) work undertaken pursuant to a public franchise or charter, *see, e.g., 2 Restatement of Torts 2d, supra,* § 428, p 420; *McWilliams v Detroit Central Mills,* 31 Mich 274, 276-277 (1875);

(12) ratification, *see, e.g., Herman v City of Buffalo,* 214 NY 316, 320; 108 NE 451, 452 (1915);

(13) *respondeat superior, see, e.g., City of Cincinnati v Stone,* 5 Ohio St 38, 41-42 (1855);

(14) where the performance of the contract necessarily causes the harm in question, *see, e.g., McDonell v Rifle Boom Co,* 76 Mich 61; 38 NW 681 (1888);

(15) where the principal retains control over the premises, as opposed to control over the work; 2 *Restatement of Torts2d, supra,* p 405; *Besner v Central Trust Co of New York,* 230 NY 375; 130 NE 577; 23 ALR 1081 (1921); *Rabar v E I duPont deNemours & Co,* 415 A2d 499, 506 (1980); *Johnson v Spear,* 76 Mich 139; 15 Am St Rptr 298; 42 NW 1092 (1889);

Separately, one may assume a duty to act with reasonable care, either gratuitously or for a consideration. *2 Restatement of Torts 2d, supra,* § 324A, p. 142.

Each of these exceptions is well-established in the common law of Anglo-American jurisprudence An historical review of Michigan jurisprudence discloses that this Court has recognized almost all of these.

These consolidated cases focus on two of these exceptions: (a) the "retained control" doctrine; and (b) the "inherently dangerous work" doctrine.

II. STATEMENT OF FACTS

Amici International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers adopts the Statement of Facts, as set forth by the principal parties in *Ormsby v Capital Welding, Inc, supra*, and *Deshambo v Anderson,* 2002 Mich App LEXIS 1458 (October 22, 2002) (*per curiam*).

III. ARGUMENT

A. THE *DeSHAMBO* COURT UTILIZED AN INCORRECT TEST FOR DETERMINING WHEN WORK IS "INHERENTLY DANGEROUS WORK"

The *DeShambo* Court, in its analysis of the "inherently dangerous work" doctrine, adopted the paradigm first set forth in *Szymanski v K-Mart Corp,* 196 Mich App 427, 431-432; 493 NW2d 460 (1992), *vacated,* 442 Mich 912; 503 NW2d 449 (1993), and repeated in *Rasmussen v Louisville Ladder Co,* 211 Mich App 541, 549; 536 NW2d 221 (1995), and *Schoenherr v Stuart Frankel Development Co, supra.* The *Szymanski* paradigm holds that "liability [under the "inherently dangerous work" doctrine] should not be imposed where the activity was not unusual, the risk was not unique, 'reasonable safeguards against injury could readily have been provided by well-recognized safety measures,' and the employer selected a responsible, experienced contractor." *Szymanski, supra.* The thematic difficulty is that the *Szymanski* paradigm neither describes nor defines "inherently dangerous work," but rather "abnormally dangerous activity." As demonstrated below, the two rules are not only separate and mutually exclusive doctrines, but one also is well-grounded in the common law of Michigan, whereas the latter is not.

In the law of principals employing contractors, there are two separate, independent and distinct rules of law which are frequently confused. The first rule of law, which creates an

exception to the so-called "general rule" granting immunity from liability to the employer of an independent contractor for the negligence of that contractor[8], is the doctrine of "inherently ultrahazardous work," or "ultrahazardous activity[9]," also known as liability for "abnormally dangerous activity." This is a rule of *absolute* liability. Thus, liability is imposed if harm or injury occurs, regardless of the degree of care exercised or the existence or non-existence of negligence *vel non*. *See, e.g.*: *McSparran v Hanigan,* 225 F Supp 628, 638 (ED Penna 1963), *aff'd,* 356 F2d 983 (3rd Cir 1966). This rule of law is treated in the *Restatement of Torts2d* in two separate places.

First, the Reporter to the *Restatement of Torts2d*, Dean William Prosser, addresses the issue under those Sections dealing with "Employers Of Contractors." There, in 2 *Restatement of Torts2d* (1965), §427A, pp 418-419, the Section and the accompanying Comments and Illustrations provide as follows:

> **§427A. Work Involving Abnormally Dangerous Activity**
>
> One who employs an independent contractor to do work which the employer knows or has reason to know to involve an abnormally dangerous activity, is subject to liability to liability to the same extent as the contractor for physical harm to others caused by the activity.
>
> **Comment:**
>
> *a.* As to what is an abnormally dangerous activity, see §§519-524A. The rules stated in those Sections are applicable to determine the liability of both the employer and the independent contractor.
>
> *b.* The principle underlying the rule stated in this Section is that one who employs an independent contractor to do work which the employer knows or has reason to know to involve an abnormally dangerous activity cannot be permitted to escape the responsibility for the abnormal danger created by the activity which he has set in motion, and so cannot delegate the responsibility

[8] 2 *Restatement of Torts2d* (1965), §409, p 370; *DeForest v Wright, supra.*
[9] This is the terminology used in the first Restatement of Torts. 3 *Restatement of Torts* (1938), §§519, 520, pp 41-47.

for harm resulting to others to the contractor.

Illustrations:

1. The A Company, making a motion picture, employs B, an independent contractor, to provide for the picture a circus act involving a number of performing lions. While the picture is being made, *without any negligence on the part of either A Company or B,* one of the lions escapes, and attacks and injures C. A Company is subject to liability to C.

2. In a jurisdiction in which blasting is classified as an abnormally dangerous activity, A employs B, an independent contractor, to excavate a foundation in the midst of a city. The contract provides, or A knows, that B will carry on blasting operations in the course of the excavation. B carries on the blasting *with all proper care,* but the blasting damages the building of C. A Company is subject to liability to C.

[Emphases added].

The Reporter, in the Appendix to this Section, 3 *Appendix: Restatement of Torts2d* (1966), §§402A-503, p 83 notes that this Section was added to the *Restatement of Torts* (1938). The Reporter further cites, as support for the rule, *inter alia,* to *Rylands v Fletcher,* [1866], LR Ex 265; 1 ERC 236, *aff'd,* [1868], LR 3 HL 330; 1 ERC 257.

The rules governing the imposition of liability for "abnormally dangerous" activities is also addressed by the Reporter in 3 *Restatement of Torts2d* (1977), §§519-520, pp 34-43. The following is a statement of the rules, and excerpts from the Reporter's Comments:

§519. General Principle

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Comment:

* * *

c. The liability stated in this Section is not based upon any intent of the defendant to do harm to the plaintiff or to affect his interests, *nor is it based*

> *upon any negligence*, either in attempting to carry on the activity itself in the first instance, or in the manner in which it is carried on. The defendant is held liable although he has exercised the utmost care to prevent the harm to the plaintiff which ensued. The liability arises out of the abnormal danger of the activity itself, and the risk it creates, of harm to those in the vicinity. It is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.
>
> [Emphasis added].

3 *Restatement of Torts2d , supra,* at pp 34-35. Again, the Reporter, in the Appendix to this Section, 4 *Appendix: Restatement of Torts2d* (1981), §§504-587, p 46, notes the change in nomenclature from "ultrahazardous activity" in the *Restatement of Torts, supra,* the addition of Sub-Section (2), and, again, cites to *Rylands v Fletcher, supra.*

These rules, and the fact that they find their genesis in *Rylands v Fletcher, supra,* is significant, because this rule of absolute liability has never been a rule of law in Michigan. Indeed, in *Scott v Longwell,* 139 Mich 12, 15; 102 NW 230 (1905), when this Court was presented with the opportunity to adopt *Rylands v Fletcher, supra,* as the law of Michigan, it declined to do so.

In *Scott v Longwell, supra*, the plaintiff sued for civil damages to her land, as the result of water escaping, on two occasions, from the defendant's mill race. Justice Carpenter, writing for a unanimous Court, pointed out:

> The precise obligation imposed by law upon one who collects water in an artificial reservoir is a subject of grave dispute. In *Rylands v Fletcher,* L. R. 1 Ex. 265, L. R., 3 H. L. 330, it was declared that no amount of legal diligence is a legal excuse, if water escapes and damages another. The correctness of this doctrine has been much discussed by law writers and courts. It has been approved in Massachusetts (see *Gorham v Gross,* 125 Mass. 232); and Minnesota (see *Cahill v Eastman,* 18 Minn. 324). It has been disapproved in other States. See *Losee v Buchanan,* 51 N.Y. 470; *Pennsylvania Coal Co. v Sanderson,* 113 Pa. St. 126; *Marshall v Welwood,* 38 N.J. Law, 339.

> We need not, however, in this case, as we shall point out, undertake to determine its correctness.

And, it would appear that this Court has *never* adopted, nor approved, a rule of absolute liability and has *never* adopted, nor approved, the case of *Rylands v Fletcher, supra*, in order to impose civil liability for common law damages for injury to an employee of an independent contractor, or otherwise. The only instances in which *Rylands v Fletcher, supra*, has even been cited by this Court represent a mere handful of cases: *Underwood v Waldron,* 33 Mich 232 (1876) (Cooley, CJ) (*Rylands* not analogous and not controlling); *Boyd v Conklin,* 54 Mich 583; 20 NW 595 (1884) (Campbell, J); *Scott v Longwell, supra*; *Smith v Chippewa Co Bd of Rd Comm'rs,* 381 Mich 363, 378; 161 NW2d 561 (1968) (Black, J, *dissenting*); *Boyce v Wayne-Westland School District,* 453 Mich 865, 915-916; 552 NW2d 913 (1996) (Levin, J, *dissenting*).[10]

In a similar vein, the Michigan Court of Appeals has declined to apply a rule of absolute liability to a public utility furnishing household electricity, *Williams v Detroit Edison Co*, 63 Mich App 539, 569-570; 234 NW2d 702 (1975), *lv denied*, 395 Mich 800 (1975), and held that the plaintiff failed to make out a case under 3 *Restatement of Torts2d,* §519, without holding whether or not 3 *Restatement of Torts2d, supra,* §519, was a correct statement of the law in Michigan in *Mach v Locke*, 115 Mich App 191, 195; 320 NW2d 70 (1982) (*per curiam*).[11]

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[10] Dean Prosser, as the Reporter to the *Restatement of Torts2d*, does cite two Michigan cases in support of § 519. These are *Whittemore v Baxter Laundry Co,* 181 Mich 564; 148 NW 437 (1914), and *Smith v Chippewa Co Bd of Rd Comm'rs,* 5 Mich App 370, 373; 146 NW2d 702 (1966), *aff'd on other grounds*, 381 Mich 363; 161 NW2d 561 (1968). However, *Whittemore* was not a civil action at law for money damages for injury arising out of an abnormally dangerous activity, it was a suit in equity seeking an injunction against the maintenance of a private nuisance *per se.* And, *Smith* was affirmed by this Court on other grounds.

[11] The only arguable case to the contrary is *White v McLouth Steel Corp*, 18 Mich App 688; 171 NW2d 662 (1969), *lv denied,* 383 Mich 791 (1970). However, that case involved indemnity

Indeed in *Cova v Harley Davidson Motor Co,* 26 Mich App 602, 613-614; 182 NW2d 800 (1970), Justice (then-Judge) Charles Levin cautioned against the confusion inherent in mixing up "strict liability" in the sense of "absolute liability" and "strict liability" in the sense of "products liability:"

> There is a significant risk that the relabeling of the manufacturer's liability as a "strict liability" may result in the casual adoption of the absolute (strict) liability precedents developed in cases dealing with dangerous animals and abnormally dangerous activities without careful analysis of whether they are truly apposite. Nothing but further confusion is achieved by using the same label to describe both the liability of the manufacturer to a consumer and of a person who harbors dangerous animals or engages in abnormally dangerous activity.

See also, Buczkowski v McKay, 441 Mich 96, 105, n 10; 490 NW2d 330 (1992).

And, importantly, these rules of common law liability had *nothing to do* with the "inherently dangerous work" doctrine. Rather, the "inherently dangerous work doctrine" is based upon the rules stated in 2 *Restatement of Torts2d, supra,* §§413, 416, and 427.

The lack of "careful analysis" decried by Justice Levin in *Cova v Harley Davidson Motor Co*, *supra*, has led the Court of Appeals astray in the *Deshambo* case, among others, and has resulted in a body of law that defines "inherently dangerous work" in terms of a conceptual framework which describes "abnormally dangerous" activities.

Beginning with *Szymanski v K-Mart Corp*, *supra,* at *Id,* the Court of Appeals held that work could *not* be "inherently dangerous work" in circumstances in which "the activity was not

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issues and did not squarely recognize absolute or strict liability as a rule of law cognizable in Michigan. "We... hold that the joinder of the employer as a third-party defendant in a case where vicarious or strict liability is being charged against a principal defendant is permissible when it appears before trial that the employer and the defendant stand in a unique relationship which may have created certain duties and obligations by reason of contract or tort." *Id*, 18 Mich App at 693. On the other hand, when Judge Barbara MacKenzie advocated the use of 3 *Restatement of Torts 2d*, §520, to define the parameters of the "inherently dangerous work" doctrine, she was in the minority, and her view was not adopted. *Perry v McLouth Steel Corp,* 154 Mich App 284, 303-305; 397 NW2d 284 (1986) (MacKenzie, J, *dissenting*).

unusual, the risk was not unique, reasonable safeguards against injury could readily have been provided by well-recognized safety measures, and the employer selected a responsible, experienced contractor." [Internal quotation marks deleted; citation deleted]. *Schoenherr v Stuart Frankel Development Co, supra*; *Milosevich v John M Olson Co*, 2002 Mich App LEXIS 759 (May 28, 2002) (*per curiam*); *Nagy v Consumers Power Co*, 2001 Mich App LEXIS 1139 (May 15, 2001) (*per curiam*); *Helzer v CBS Boring & Machine Co*, 1999 Mich App LEXIS 593 (June 8, 1999) (*per curiam*); *Rasmussen v Louisville Ladder Co, supra.*

The overwhelming majority of these cases are unpublished, *per curiam* opinions, which purportedly have no precedential value, individually. However, collectively, they represent the thinking of a large and important bloc of the members of the Michigan Court of Appeals.[12]

This formulation from *Szymanski* is derived from *dicta* in Justice Levin's opinion in *Funk v General Motors Corp, supra*, and, according to Chief Judge Whitbeck in *Schoenherr v Stuart Frankel Development Co, supra*, at *13, "remains good law on this point." However, there are several flaws in that conclusion.

First, this formulation has never been adopted nor approved by this Court. Indeed, this formulation runs counter to Justice Riley's definition of "inherently dangerous work" adopted by this Court in *Bosak v Hutchinson, supra*, and those Court of Appeals cases, such as *Ormsby v*

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[12] *Symanski v K-Mart Corp, supra* (Griffin, PJ, Holbrook, Jr., Reilly, JJ); *Schoenherr v Stuart Frankel Development Co, supra* (Whitbeck, CJ, Gage, Zahra, JJ); *Milosovich v John M Olson Co, supra* (Neff, PJ, Cavanaugh, Saad, JJ); *Nagy v Consumers Power Co, supra* (Whitbeck, PJ, MacDonald, Collins, JJ); *Helzer v CBS Boring & Machine Co, supra* (Bandstra, CJ, Markey, Talbot, JJ); *Rasmussen v Louisville Ladder Co, supra* (Griffin, PJ, Sawyer, Ziolkowski, JJ). Therefore, of the 27 Judges currently serving on the Michigan Court of Appeals, the Chief Judge and 11 other Judges have signed opinions employing the *Szymanski* formulation of "inherently dangerous work." Of these 12, eight are among the most senior members of the bench. In consequence, notwithstanding the provisions of MCR 7.215(C)(1), this body of law represents an intellectual force to be reckoned with, whenever an injured construction worker faces appellate review of this issue.

Capital Welding, Inc, *surpa*, which have remained true to that definition. In consequence, it has created a split of authority in the fabric of Michigan jurisprudence which must be mended by this Court.

Second, to the extent that this formulation is accepted by the Federal courts in Michigan as a correct statement of the law (when it is not), *see*, *e.g.*: *Sprague v Toll Bros, Inc*, 265 F Supp2d 792 (ED Mich 2003) (Zatkoff, CJ), the doctrine of "Our Federalism[13]" is greatly harmed, because the Federal bench is now also being led astray. *Erie R R Co v Tompkins,* 304 US 64, 78; 58 S Ct 817; 82 L Ed 1188 (1938).

Third, as pointed out elsewhere, the conceptual framework adopted in *Szymanski v K-Mart Corp*, *supra*, and its progeny, is one of absolute liability, not vicarious liability. The factors to be considered in deciding whether the particular conduct at issue is to be an "abnormally dangerous" activity are set forth in 3 *Restatement of Torts2d*, *supra*, §520, p 36, as follows:

> **§520. Abnormally Dangerous Activities**
>
> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

A comparison of the test of "inherently dangerous work" in *Szymanski v K-Mart Corp*, *supra*,

and the language of 3 *Restatement of Torts2d, supra*, §520, discloses that the *Szymanski* Court simply adopted factors (d), (a), (b), and a requirement that "the employer selected a responsible, experienced contractor."[14]

This is wrong, both legally and logically. If the "inherently dangerous work" doctrine, which finds its genesis in *Bower v Peate*, [1873], 1 OBD 321, 326[15] and *not Rylands v Fletcher, supra*, is to operate as it was intended, as a rule of *vicarious* liability and not a rule of *absolute* liability, then, by definition, the putative defendant is being held liable for the negligence of another, and the injury must have been preventable.

As the Supreme Court of Colorado has recognized in *Huddleston v Union Rural Electrical Ass'n,* 841 P2d 282, 290 (Colo 1992), when a court confounds the concepts of "inherently dangerous work" and "abnormally dangerous activity," reversible error ensues. "The court of appeals held that because the activity for which Brooks was hired could have been performed without danger, such activity could not have been inherently dangerous....This, however, is not the correct test, for an activity may be inherently dangerous even if it can be performed safely by taking proper precautions..." [Citation omitted]. The Colorado Supreme Court went on to make the same point which is being made here: "The test employed by the court of appeals seems more appropriately suited to determining whether an activity is abnormally dangerous within the meaning of §520 of the Second Restatement." *Id.*, n 10. *See*

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[13] *Younger v Harris,* 401 US 37, 44; 91 S Ct 746; 27 L Ed2d 669 (1971).

[14] In practice, however, this "requirement" has never been honored, undoubtedly because of the holding in *Reeves v K-Mart Corp, supra,* in which the Michigan Court of Appeals found that, in Michigan, there is no duty to employ a careful contractor.

[15] Whereas this Court eschewed the adoption of the rule of absolutely liability of *Rylands v Fletcher, supra*, in *Scott v Longwell, supra*, this Court embraced the rule of vicarious liability announced in *Bower v Peate, supra*, in *Inglis v Millersburg Racing Ass'n*, 169 Mich 311, 320-321; 136 NW 443 (1912), and like cases. *See, Johnson v Spear,* 76 Mich 139, 143; 42 NW 1092 (1899); *Grinnell v Carbide & Carbon Chemicals Corp,* 282 Mich 509, 526-529; 276 NW 535

also, Stevens v United Gas & Electric Co, 73 NH 159; 60 Atl 848 (1905).

Fourth, the Court of Appeals has adopted a fundamental misunderstanding of the "inherently dangerous work" doctrine, and the nature of nondelegable duty, in an ill-advised departure from established precedent. As Chief Judge T. John Lesinski recognized in *Mulcahy v Argo Steel Constr Co*, 4 Mich App 116, 127; 144 NW2d 614 (1966), *lv denied*, 378 Mich 741 (1966):

> Under this theory of liability, commonly referred to as the "inherently dangerous activity" theory, the general or employer is held liable not for his own culpable negligence, but for the negligence of the independent contractor engaged in an activity of such a character that it necessarily subjects third persons to unusual danger. Thus, the general contractor is made *vicariously liable* for the negligent acts of the independent contractor.
>
> [Emphasis added; citation omitted].

And, finally, the *Szymanski* paradigm is bad public policy. The purpose of the tort law is not simply to provide reasonable and adequate compensation for the injured victims of culpable tortfeasors; rather, the fundamental purpose of the tort law is to prevent the occurrence of serious injury or death in the first place.[16] The *Szymanski* paradigm does nothing to promote construction safety. The *Szymanski* paradigm does nothing to deter negligent misconduct. Rather, the *Szymanski* paradigm is a thinly-disguised form of judicial activism which legitimizes the transference of risk from the tortfeasor to the public, in the form of increased public welfare, increased MEDICARE or MEDICAID costs, increased food stamps, and the like. Under *Szymanski,* liability is not determined by the democratic institution of the petit jury, but by the autocratic policy-making of an appellate judiciary.

Thus, the "inherently dangerous work" doctrine is "closely akin to, but not exactly the

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(1937); *cf. Geller v Briscoe Mfg Co,* 136 Mich 330; 99 NW 281 (1904).

[16] *Funk v General Motors Corp, supra,* 392 Mich at 104.

same as, strict liability...." [Footnote omitted.] *Vannoy v City of Warren, supra,* 15 Mich App at 163. It is still a rule of negligence, requiring proof of the standard of care, proof of a violation of the standard of care, proof of causation, and proof of damage. *Brown v Unit Products Corp (On Remand),* 123 Mich App 157, 160; 333 NW2d 204 (1983), *lv denied,* 417 Mich 1100.42 (1983).

When the work undertaken is "inherently dangerous work," and the principal puts the special precautions and safety specifications into the body of the contract, then the rule as stated in 2 *Restatement of Torts 2d, supra,* §§ 416, 427, pp 395-398, 415-418, applies.

Where the work is "inherently dangerous work," and the principal has failed to specify in the contract the special precautions for the safe conduct of the work, then the rule as set forth in 2 *Restatement of Torts 2d, supra,* § 413, pp. 384-385. *See, Id.*, Comment *a.*, p. 385.

In either instance, in order for the work to be considered "inherently dangerous work," it "does not mean that the risk must be one which is abnormal to the type of work done, or that it must be an abnormally great risk. It has reference only to a special, recognizable danger arising out of the work itself." 2 *Restatement of Torts 2d, supra,* § 413, Comment *b.*, pp. 385-386.

In addition, "it is certainly not at all essential that the risk be an unavoidable one, necessarily involved in the work itself. It is enough that the usual or contemplated methods of doing the work are likely to lead to such a special risk. . . " W. Page Keeton, *Prosser and Keeton on The Law of Torts* (5th ed 1984), § 71, p. 515.

In other words, as Justice Talbot Smith pointed out in his seminal law review article, "[t]he unreasonable risk from *routine acts of negligence* may. . . be the very reason why an operation is said to be inherently dangerous [emphasis added]." T Smith, *Collateral Negligence,* 25 Minn L Rev 399, 427 (1941).

In *Olah v Katz,* 234 Mich 112, 117; 207 NW 892 (1926), this Court quoted from *Murphy*

v Perlstein, 73 App Div 256; 76 NYS 657 (1902), with apparent approval as follows: "If the character of the work creates the danger or injury, then the owner of the property remains liable to persons who are injured by a failure to properly guard or protect the work, even though the same in its entirety is entrusted to a competent independent contractor."

In *Watkins v Gabriel Steel Co,* 260 Mich 692; 245 N.W. 801 (1932), a steel erection case, this Court held in similar fashion: "While the general rule is that a contractor is exempt from liability caused by the negligence of an independent contractor to his servants, it is subject to the exception that such liability cannot be evaded, unless proper precautions are take, when the work to be done is inherently or intrinsically dangerous."

In *Bosak v Hutchinson, supra*, 422 Mich at 727-728, after reviewing the prior precedent in Michigan, the Court held: "it is apparent that an employer is liable for harm resulting from work 'necessarily involving danger to others, unless great care is used' to prevent injury, *Inglis,* supra, 331, *or* where the work involves a 'peculiar risk' or 'special danger' which calls for 'special' or 'reasonable' precautions. *2 Restatement Torts 2d*, Sections 416, 427." [Emphasis added].

Unfortunately, the Defendant-Appellant Neilsens fail to appreciate the distinction between these two separate, independent, and distinct rules of law. *Brief on Appeal of Defendant-Appellants Norman R Nielsen and Pauline Nelson* (December 30, 2003), p 30. The whole point of the "inherently dangerous work" doctrine is that the principal is made vicariously liable because its contractor failed to take "recognized safety measures" when the character of the work, or the built-in hazards of the work, require such special or reasonable precautions.

B. THE DeSHAMBO COURT CORRECTLY HELD THAT THE QUESTION OF WHETHER THE WORK UNDERTAKEN, AND THE WORK IN WHICH THE PLAINTIFF WAS ENGAGED AT THE TIME OF HIS INJURY, WAS "INHERENTLY DANGEROUS WORK" IS A QUESTION OF FACT FOR THE JURY

The overwhelming number of common law court which have addressed the question, including those in Michigan, have held that the question of whether particular work is "inherently dangerous work" is a question of fact for the jury. *Phillips v Mazda Motor Mfg (U SA) Corp,* 204 Mich App 401, 406; 516 NW2d 502 (1994); *Thon v Saginaw Paint Mfg Co,* 120 Mich App 745, 750; 327 NW2d 551 (1983); *Warren v McLouth Steel Corp, supra*, 111 Mich App at 503-504; *Brown v Unit Products Corp,* 105 Mich App 141, 150-151; 306 NW2d 425 (1981), *remanded on other grounds,* 414 Mich 956; 327 NW2d 254 (1982); *Dowell v General Telephone Co,* 85 Mich App 84, 91; 270 NW2d 711 (1978), *lv denied*, 405 Mich 803 (1979); *Witucke v Presque Isle Bank,* 68 Mich App 599, 611 n 5; 243 NW2d 907 (1976), *lv denied,* 397 Mich 840 (1976); *Vannoy v City of Warren, supra*, 15 Mich App at 164; *see also, Oberle v Hawthorne Metal Products Co,* 192 Mich App 265, 269; 480 NW2d 330 (1991) (*per curiam*), *lv denied,* 440 Mich 884; 487 NW2d 425 (1992); *Donovan v General Motors Corp,* 762 F2d 701, 703 (8th Cir 1985) (applying Missouri law); *Schultz & Lindsay Constr Co v Erickson,* 352 F2d 425, 436 (8th Cir 1965) (applying North Dakota law); *McMillan v United States,* 112 F3d 1040, 1044 (9th Cir 1997) (applying Montana law); *Christie v Ranieri & Sons,* 194 App Div 2d 453; 599 NYS2d 271, 272 (1993); *Western Stock Center v Sevit, Inc,* 195 Colo 372; 578 P2d 1045, 1048 (1978); *Moss v Swann Oil Co,* 423 F Supp 1280, 1284 (E D Penna 1976); *Elliott v N H Public Svc Co,* 128 NH 676; 517 A2d 1185, 1188 (1986); *Makaneole v Gampon,* 70 Haw 501; 777 P2d 1183 (1989); *Giarratano v Weitz Co,* 259 Iowa 1292; 147 NW2d 824, 834 (1967).

The issue of "inherently dangerous work" is one particularly suitable for jury resolution

as a fact question. For example, window washing at ground level, inside a kitchen, with no more equipment that a bottle of Windex© and a roll of paper towels would not be. Washing windows on the outside of the seventeenth story of an office building is another matter.

In *Warden v Pennsylvania R R Co,* 123 Ohio St 304, 308 (1931), Chief Justice Marshall of the Ohio Supreme Court wrote as follows:

> The circumstances surrounding the execution of a contract by an independent contractor might be such that it could properly be stated that, as a matter of law, there would be no liability on the part of the owner. On the other hand, the circumstances might be such as to make it very clear that the owner would carry a legal responsibility for the negligence of the contractor, to be determined by the court without submission to the jury. *Between these two extremes, the circumstances may be so complicated that minds might easily differ as to the danger attendant upon the execution of the work, resulting in different conclusions as to the duty of the owner to exercise care to avoid injury to third persons.*
>
> [Emphasis added].

C. THE SALUTORY EFFECTS OF THE "INHERENTLY DANGEROUS WORK DOCTRINE" SERVE TO SAFEGUARD THE OCCUPATIONAL SAFETY AND HEALTH OF THE PERSONS ENGAGED IN THE ACTUAL PERFORMANCE OF THE WORK

In Michigan, it is well-established that an injured construction worker may prosecute a common law action against the owner, architect, general contractor, construction manager, or prime contractor who undertakes inherently dangerous work. *McDonough v General Motors Corp,* 388 Mich 430; 201 NW2d 609 (1972)(*per curiam*); *Bosak v Hutchinson, supra* (citing prior case law); *Vannoy v City of Warren, supra,* 15 Mich App at 164 (rejecting the argument that the "inherently dangerous work" doctrine does not apply to employees of the employed contractor); *Warren v McLouth Steel Corp, supra,* 111 Mich App at 504 ("... we reject McLouth's contention that the doctrine of inherently dangerous activity, as a matter of law, is

inapplicable to an independent contractor or an employee of an independent contractor"); *Muscat v Khalil,* 150 Mich App 114, 119; 388 NW2d 267 (1986), *lv den,* 425 Mich 864; 387 NW2d 267 (1986); *Coy v Richard's Industries, Inc,* 170 Mich App 665, 672; 428 NW2d 734 (1988), *lv den,* 432 Mich 856 (1989) (holding that the "inherently dangerous work" doctrine is strictly confined to the law of principals employing contractors, and does not extend to other kinds of relationships); *Phillips v Mazda Motor Mfg (USA) Corp, supra,* 204 Mich App at 406 (*held,* that the "inherently dangerous work" doctrine "applies to independent contractors and employees of independent contractors as well as third parties on the premises").

This is as it should be. First, this is a rule of law which fosters deterrence in corrective justice. As Professor Dan Dobbs points out in his treatise, 1 D Dobbs, *The Law of Torts* (2001), §11, pp. 19-20:

> *Deterrence.* Courts and writers almost always recognize that another aim of tort law is to deter certain kinds of conduct by imposing liability when that conduct causes harm. The idea of deterrence is not so much that an individual, having been held liable for a tort, would thereafter conduct himself better. It is rather the idea that all persons, recognizing, potential tort liability, would tend to avoid conduct that could lead to tort liability. They might sometimes engage in the conduct in question, but only if they would get more out of it than the tort liability would cost. Some critics believe that tort law fails to provide systematic deterrence.[1]
>
> [1] See, with different arguments, STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 7-9 (1989); Daniel Shuman, The Psychology of Deterrence in Tort Law, 42 KAN. L. REV. 115 (1993).]
>
> *Deterrence in corrective justice and social policy systems.* Both corrective justice and social policy goals can agree that deterrence is acceptable, but the two approaches might call for deterring quite different conduct. If you focus on conduct that is wrongful in the sense of being unjust to an individual, you might regard any given act as wrongful even though it is economically useful in society. If you focus on social policy, you might want to forgive defendants who cause harms by their socially useful activities.
>
> Suppose for example that there are two methods of constructing a building the defendant intends to build. One is quick, easy, and cheap. The other is slow and expensive. The trouble is that the quick, easy, cheap building is also a little more dangerous to build, so that, overall, more injuries occur in the construction of the

cheaper buildings than in construction of the more expensive ones that are slower to build. Not surprisingly, the defendant chooses to build the cheaper, quicker version. Suppose he builds it with care, but, as will inevitably happen sooner or later, someone is injured in a construction accident. Should the injured person have a claim against the builder-defendant?

A corrective justice approach to the builder. A corrective justice approach would not necessarily say that the builder had committed a wrong. However, in deciding whether a wrong was done, a hard-line corrective justice approach might give no weight to the fact that the defendant was doing something economically sound or socially useful. So it is quite possible that from a corrective justice standpoint, a jurist might say that the defendant was a wrongdoer in choosing to build the riskier building, even though he built it with great care. That conclusion would lead to liability.

A social policy approach to the builder. A social policy approach would not necessarily approve the builder's choice any more than a corrective justice approach would necessarily disapprove it. However in deciding whether the builder committed a legal wrong, a social policy approach would ask whether it would be good for society as a whole either to deter the builder's conduct or force him to pay for the harms done. So a social policy approach might well decide that it is socially desirable to foster economically sound decisions, such as the decision to build a cheaper building, at least if the money saved was more than the cost of injuries.

Economic analysis. As the example suggests, one particular kind of social policy consideration is the economic one. If economics is defined broadly enough to include a consideration of all human wants and desires, then perhaps all social policies are in a sense economic policies.

For instance, economic analysis of the personal injury part of tort law might attempt to suggest rules for finding the right balance between the number of injuries and the freedom of defendants to act. People in general ought to be free to build buildings, including cheaper ones, if they do so carefully; the law wants to protect their freedom and indeed encourage the enterprise because economically sound decisions are indeed good for the community as a whole. So one line of economic thought suggests that in deciding the builder's tort liability, the costs of injury should be weighed, but so should the social (economic) utility of the cheaper building.[2]

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[2]See §§ 144-146.

A different line of economic/public policy thinking might assert that if it is statistically likely that more injuries occur when the cheaper building is constructed, then the costs of those injuries should be regarded as a part of the builder's costs of doing business. Even if he is not regarded as being at fault, nevertheless, he chose the riskier method and got its benefits (less investment in the building); so he should take the disadvantages.[3] In economic terms, he should not be permitted to externalize his costs. This line of reasoning leads to the

conclusion that the builder should be held liable for the injuries caused.

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[3]In § 9 this line of thought was presented as a moral rather than an economic principle.

[4]Cf. GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970) (suggesting that if the activity (building, in this case) bears the costs of accidents associated with that activity, the costs of the activity will rise and accidents will be reduced either because people will seek alternate ways of avoiding the higher costs or ways of making the activity safer).

Tort law has tended, although not universally, to resolve many disputes in a way consistent with the first line of economic analysis, taking into account the benefits and costs of a particular activity in judging fault. On the other hand, workers' compensation and some other alternatives to tort law have resolved certain disputes in a way consistent with the second kind of analysis, holding the defendant liable even if he was not at fault.

See also, C Wells, Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication, 88 Mich L Rev 2348, 2411 (1990).

In Mary Margaret McEachern's article, *Inherently Dangerous or Inherently Difficult,* 17 Campbell L Rev 483, 519 (1995), the author makes this point:

> That the North Carolina Supreme Court denied discretionary review of the Hooper decision suggests a general desire in the state court system to narrow the scope of the doctrine as far as is possible. However, too much narrowing may only exacerbate the impracticability of the poorly-understood doctrine. Such extreme narrowing also causes courts to find fewer and fewer instances of inherently dangerous activity, in any circumstance. *This proves detrimental to those people who benefit most from the doctrine—people like the decedent's estate in Hooper, who are of modest means, compared to large general contractors who are burdened relatively little by the doctrine.*
>
> *The inherently dangerous work doctrine has one simple aim: to force general contractors and other employers to uphold their duties to warn, or otherwise provide for the safety of subcontractors, their employees, and the public in general.*
>
> [Emphasis added; footnotes omitted].

In *Bagley v Insight Communications Co, LP,* 658 NE2d 586, 588 (Ind 1995), the Supreme Court of Indiana rejected the argument that injured workers should not be protected by these rules of law, with this cogent analysis:

> As noted above, the five exceptions represent specific, limited situations in which

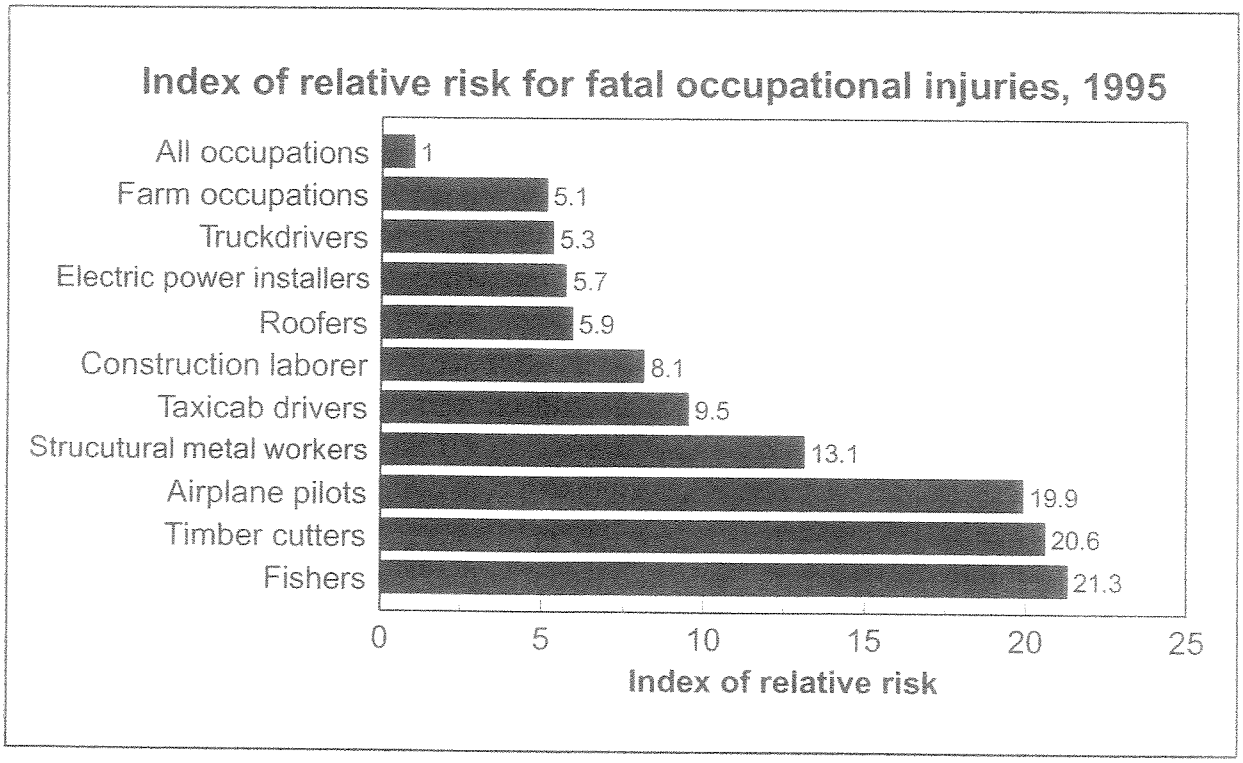
> the associated duties are considered non-delegable because public policy concerns militate against permitting an employer to absolve itself of all further responsibility by transferring its duties to an independent contractor.... The exceptions encourage the employer of the contractor to participate in the control of the work covered by the exceptions in order to minimize the risk of resulting injuries. Our objective is to no less protect workers who may be exposed to such risks than it is to protect non-employee third parties. The fact that partial remuneration through worker's compensation benefits may be available to an employee of an independent contractor does not diminish the policy rationale of providing an additional incentive to eliminate or minimize risks of injury which arise from non-delegable duties. Where a contractor's employer is responsible for a non-delegable duty, the contractor's injured worker should not discriminately be deprived of access to full compensatory damages but should have recourse equal to that of an injured bystander. Likewise, to the extent that an injured worker's awareness of a job-related risk may be greater than that of a non-worker, substantial fairness and equal treatment are ensured because in a worker's action against the contractor's employer, any incurred risk on the part of the worker will be treated as "fault" and will be reflected in a proportionately reduced damages award under our comparative fault statute.

Another beneficial purpose of the "inherently dangerous work" doctrine is that it exacts an extra measure of care when the principal selects and employs the contractor. R Steinberg, Ch. 10: "Construction Site Injuries and Deaths: The Law of Principals Employing Contractors," 1 *Torts: Michigan Law and Practice* (ICLE 2nd ed), § 10.10, p. 10-16; M McEachern, *supra,* 17 Campbell L Rev at 502; W Keeton, *Prosser and Keeton on Torts, supra,* §71, pp 510-515.

Finally, as Chief Justice Taft taught us, in a famous opinion, *Bailey v Drexel Furniture Co*, 259 US 20, 37 (1922): "a court must be blind not to see....[what]... [a]ll others can see and understand." There is very nearly universal understanding in the construction management literature, in the safety literature, and in the public health literature that steel erection is one of the most dangerous crafts in the building trades; and, that ironworkers are engaged in inherently dangerous work. And, the same holds true for logging. *See, McMillan v United States, supra.* According to the U.S. Department of Labor, Bureau of Labor Statistics, logging is the most dangerous occupation in the United States. The mortality rate among loggers in 2002 was 118

timber cutters per 100,000 workers, making it 26 times more likely for a logger to suffer a fatal on-the-job injury as the average worker. For the same year, iron workers has a mortality rate of 58.2 iron workers per 100,000 workers, making it the fifth most dangerous occupation in the United States. *See*, http://money.cnn.com/2003/10/13/pf/dangerousjobs/index.htm.[17]

Guy Toscano, in his article, "Dangerous Jobs," published in *Compensation and Working Conditions OnLine,* (Vol. 2, No. 2) (Summer, 1997), a U.S. Department of Labor publication, analyzed the index of relative risk for fatal injuries for the year 1995. The following chart graphically depicts his findings:



The Center For Workers Rights, focusing in on just the construction industry for the same year, compares fatal and non-fatal falls by trade. The Center For Workers Rights, *The Construction Chart Book* (2nd ed 1998), p. 34:

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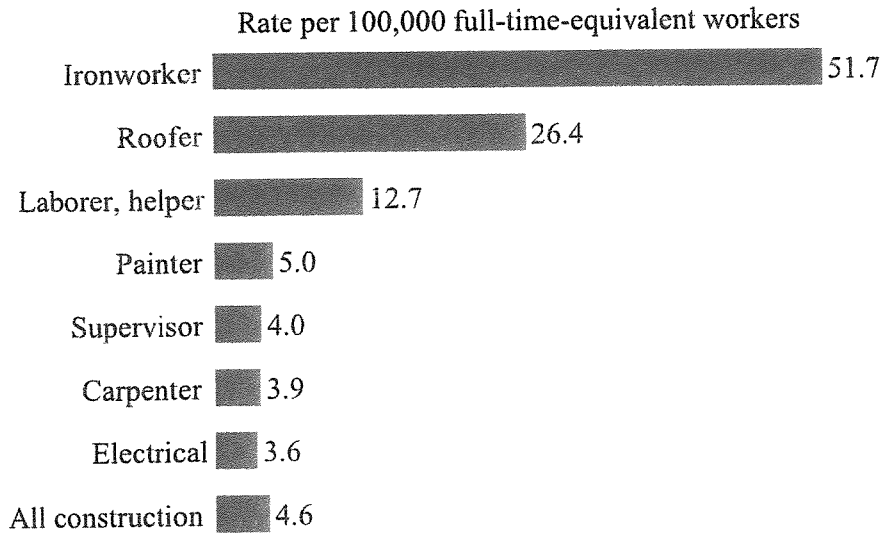
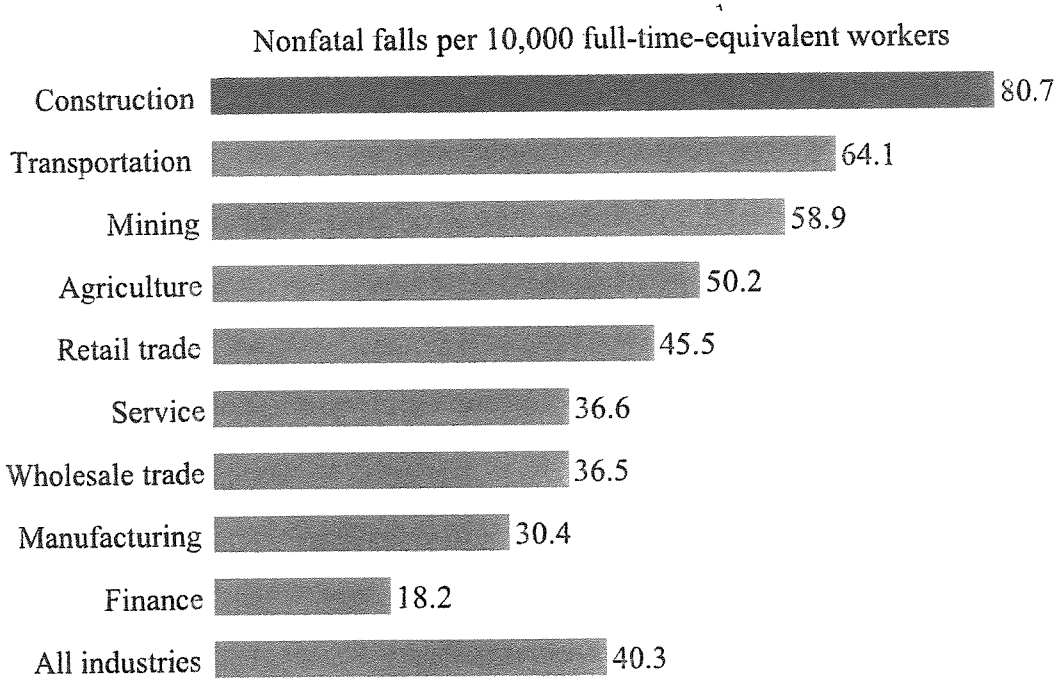
[17] J Sweet, *Sweet on Construction Law* (American Bar Association, 1997), p 15: "At a certain point, the contractor takes charge of the site. Now it is a 'workplace.' This is quite important. Construction is a dangerous business; next to mining, it is the most dangerous work activity."

34a. **Rate of deaths from falls, selected construction occupations, 1995**



34b. **Rate of work-related nonfatal falls, by industry, 1995**



Furthermore, in *Parrish v Omaha Public Power District*, 242 Neb 783; 496 NW2d 902, 913 (1993), the Nebraska Supreme Court cited *Funk v General Motors Corp*, *supra*, with approval, and then held: "*Without question, steel construction work involves risks which an average person does not ordinarily encounter on a day-to-day basis.*" [Emphasis added].

Importantly, no party and no *amicus*, except for the Defendant-Appellant Nielsens, makes any argument that the employees of the employed contractor should not be permitted to recover common law damages under the "inherently dangerous work" doctrine. The result sought by the Nielsens would, first of all, create an anomaly, under which injured workers would be considered "others" within the meaning of some of the rules stated in the *Restatement of Torts2d, supra,* §§ 410-429, but not others. Second, it would create more problems than it would solve. For example, what if the injured worker has no right to recover benefits under the Workers' Disability Compensation Act, and liability under the "inherently dangerous work" doctrine is his or her only remedy? Third, it would provide a disincentive to hire the most careful and competent contractors, in favor of the cheapest, fly-by-night, "low bid" contractors. Fourth, it will have no immediate beneficial effect in the market place. Prudent principals always include indemnity clauses in their contracts, require the purchase of indemnity insurance, and frequently require the contractor to name the principal as an additionally named insured. That industry practice will not change because of one common law decision, or even a body of common law granting immunity, because the law can always change back, and no principal wants to be uninsured. The only practical effect will be to make those workers in the most dangerous occupations second class citizens, without the same rights a complete stranger to the work would have.

The Nielsens do not provide any compelling argument to change the longstanding rules of law in this area in Michigan, and this Court should decline their invitation and reject their analysis.

D. ONE WHO ENTRUSTS WORK TO AN INDEPENDENT CONTRACTOR BUT WHO RETAINS CONTROL OVER ANY PART OF THE WORK IS SUBJECT TO LIABILITY FOR PHYSICAL HARM TO OTHERS

A cause of action arises in favor of any injured construction worker who is injured because of the personal negligence of the principal who reserves control over the scheduling, progress or conduct of the work; and, then, either exercises that control negligently, or fails to exercise the retained control, so as to cause injury to those engaged in the work.

In *2 Restatement of Torts 2d* (1965), § 414, p. 387, one aspect of the rule is set forth as follows [emphasis added]:

> One who entrusts work to an independent contractor, but who retains the control of *any* part of the work, is subject to liability for physical harm to others for which safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.
>
> [Emphasis added].

Comment *a.* to this Section explains the rule further as follows [emphasis added]:

> *a.* If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. *The employer may, however, retain a control less than that which is necessary to subject him to liability as master.* He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. *Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable cause so as to prevent the work which he has ordered to be done from causing injury to others.*

This rule of negligence imposes liability on a basis completely different from the doctrine of *respondeat superior*, which is a rule of Agency. It imposes liability for negligent supervision of the work, even though the relation of master and servant, or principal and agent, does not exist. *2 Restatement of Torts 2d*, § 414, Comment *a.* The rule focuses on those who act as

general contractors or construction managers, *Id*, Comment *b*., but may also apply to an owner who has a representative, or superintending architect engineer, overseeing the work, as in *Bissell* v *Ford*, 176 Mich 64; 141 NW 860 (1913), *or* where the principal has the power to impose sanctions on contractors who fail to perform their work safely. *Plummer* v *Bechtel Constr Co*, 440 Mich 646; 489 NW2d 66 (1992).

The test for imposing liability is described by the Reporter to the *Restatement* as follows:

> In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. *There must be such a retention of right of supervision that the contractor is not entirely free to do the work in his own way.*
>
> [Emphasis added].

2 Restatement of Torts 2d, § 414, Comment *c*. Either actual or constructive knowledge will suffice as a predicate for liability. *Id*, Comment *b*.

In Michigan, this rule of liability finds its genesis in *Moore* v *Sanborne*, *supra*, 2 Mich at 529, where it began as an outgrowth of the then-fledgling doctrine of *respondeat superior*:

> The much vexed, and yet unsettled question of the application of the maxim, *respondeat superior*, is here raised. Perhaps no fixed rule can be established respecting its application, for it must always depend more or less, upon the character of the employment, and the nature of the contract, which may be under consideration, and which will be as various as the occasions which give rise to them. From a careful examination of all the cases which have been brought to my notice, I think it may be safely said that the doctrine of *respondeat superior* applies to all cases: 1st. Where the relation of master and servant, in its more familiar signification, exists; 2d. *Where the* ***superior*** *[principal] is in possession of fixed property (as real estate), upon which some service is to be performed; for in such cases the use of the property is confined by law, to himself, and he should take care that that use and management works no injury to others, and of consequence that he brings no persons there who do any mischief to others*; and 3d. Where, although a special contract be entered into respecting personal

> property, or services, which does not create the relation of master and servant, as more familiarly understood, yet *the principal retains a supervisory power over the execution of the contract, and the actual or constructive possession of the property remains in him....*
>
> [Emphasis added].

See also, Thon v *Saginaw Paint Mfg Co, supra* (*held*, the issue "is primarily a question of fact" even where a written agreement defines the relationship).

The question of whether the measure of control retained, and/or exercised, is sufficient to trigger liability under § 414 is a question of fact for the jury. *See, e.g., Donovan* v *General Motors Corp*, 762 F2d 701 (8th Cir 1985). As the Supreme Court of Wyoming not long ago expounded in *Jones* v *Chevron, USA, Inc*, 718 P2d 890, 895 (Wyo 1986): "[a]n owner does not have to retain a great deal of control over the work to be liable for an employee's harm under § 414."

How very little control must be retained in order for § 414 to operate is demonstrated in the case of *Signs, Admx* v *Detroit Edison Co, supra*, and in *Warren* v *McLouth Steel Corp, supra*.

In *Plummer v Bechtel Construction Co, supra*, 440 Mich at 661-662, this Court articulated a test for determining "retained control," as follows:

> The line drawn in the Restatement commentary seeks to differentiate between a situation where the subcontractor 'need not' follow the suggestions or recommendations of the owner/general contractor, as the case may be, or persons monitoring the work for the owner/general contractor, and a situation where the right of supervision retained by the owner/general contractor is such that the subcontractor is not 'entirely free' to ignore suggestions and recommendations.

And, as the Supreme Court of Ohio held in *Gwathney v Little Miami R Co*, 12 Ohio St. 92, 97 (1861): "he who has the power of control is held responsible for its exercise." *See also, Exxon Corp v Quinn,* 726 SW2d 17, 20 (Tex 1987) (*held,* principal may be liable where it retained the right to control the contractors work, but failed to exercise the retained control with

reasonable care).

Liability is imposed where the principal has retained control, *or* where the principal has actually exercised control; both are not required. Thus, retained control is the legal equivalent to control actually exercised. In *Ripley v Priest*, 169 Mich 383, 385; 135 NW 258 (1912), this court held: "[i]f the master [principal] controls the manner of performance of the acts of which complaint is made, *or even reserves the right to supervise or control*, he is liable for the negligent performance of those acts." [Emphasis added; citations omitted]. *See also*, *Larsen v Home Tel Co*, 164 Mich 295, 325; 129 NW 894 (1911); *Brinker v Koenig Coal & Supply Co*, 312 Mich 534, 540; 20 NW2d 801 (1945) ("the test of the relationship is the right to control, whether exercised or not."); and *Jenkins v Raleigh Trucking Services, Inc*, 187 Mich App 424, 429; 468 NW2d 64 (1991) (*accord*).

The rule has broad support and has been either expressly adopted, or has been quoted with approval, in at least 23 States.[18] And, in none of these States is proof of the existence of a

---

[18] Alaska: *Hobbs v Mobil Oil Corp*, 445 P2d 933, 934 (Alaska 1968); *see also*, *Hammond v Bechtel, Inc*, 606 P2d 1269, 1274-1275 (Alaska 1980); Arizona: *Welker v Kennecott Copper Co*, 1 Ariz App 395; 403 P2d 330, 340 (1965); *see also*, *Mason v Arizona Pub Serv Co*, 127 Ariz 546; 622 P2d 493, 497 (Ariz Ct App 1980); *Koepke v Carter Hawley Hale Stores, Inc*, 140 Ariz 420; 682 P2d 425, 430 (Ariz Ct App 1984); California: *Austin v Riverside Portland Cement Co*, 44 Cal 2d 225, 232-234; 282 P2d 69, 70 (1955) (adopting the predecessor section in *Restatement of Torts* § 414 (1934); Delaware: *Rabar v E I duPont de Nemours & Co*, 415 A2d 499, 506 (Del Super 1980); *see also*, *Chesapeake & Ohio Tel Co v Chesapeake Utilities Corp*, 436 A2d 314, 327-28 (Del 1981) (applying Maryland law); Florida: *Conklin v Cohen*, 287 So2d 56, 59 (Fla 1973) (the doctrine is recognized); *Van Ness v Independent Constr Co*, 312 So2d 1017, 1019 (Fla Dist Ct App 1981); Illinois: *Larson v Commonwealth Edison Co*, 33 Ill 2d 316, 325; 211 NE2d 247, 252-53 (1965); *see also*, *Weber v Northern Ill Gas Co*, 10 Ill App 3d 625; 295 NE2d 41, 50 (1973); Iowa: *Giarrantano v Weitz Co*, 147 NW2d 824, 829-30 (Iowa 1967); Massachusetts: *Corsetti v Stone Co*, 396 Mass 1; 403 NE2d 793, 798 (1985); Michigan: *Dowell v General Tel Co*, 85 Mich App 84, 94; 270 NW2d 711 (1978), *lv denied*, 405 Mich 803 (1979); *see also*, *Warren v McLouth Steel Corp*, 111 Mich App 496, 502-503; 314 NW2d 666 (1981), *lv denied*, 417 Mich 941 (1982); *Signs v Detroit Edison Co*, 93 Mich App 626; 287 NW2d 292 (1979), *lv denied*, 411 Mich 870 (1981); Minnesota: *Thill v Modern Erecting Co*, 272 Minn 217; 136 NW2d 677 (1965) (adopting the predecessor rule in *Restatement of Torts* § 414 (1934));

common work area a necessary predicate to liability under the "retained control" doctrine.

The idea that a "common work area" is an element of *prima facie* liability under 2 *Restatement of Torts2d, supra,* §414, finds its genesis in *Candelaria v BC General Contractors, Inc,* 236 Mich 67, 74; 600 NW2d 348 (1999), *lv denied,* 462 Mich 852; 611 NW2d 799 (2000) (*Candelaria I*). First of all, *Candelaria I* ignored prior case law which expressly held that a "common work area" was not necessary to recovery under the "retained control" doctrine. *Signs, Admx v Detroit Edison Co, supra,* 93 Mich App at 635. Second, *Candelaria I* appears oblivious to the fact that the "retained control" doctrine applies in industries other than construction (*e.g.*: contract security guards), where, by definition, there is no "common work area."

Liability under *Funk v General Motors Corp, supra,* and liability under the "retained control" doctrine are distinct, and the elements of recovery should not be commingled.

Conover v Northern States Power Co, 313 NW2d 397, 406-07 (Minn 1981) (citing *Restatement (2d) of Torts* § 414); *see also, Vagle v Pickands, Mather & Co*, 611 F2d 1212, 1217 N 1 (8th Cir 1979), *cert denied*, 444 US 1033; 100 SCt 704; 62 LEd2d 669 (1980); *but see, Vagle v Pickands, Mather & Co*, 313 NW2d 396 (Minn 1981) (*on certification*); Missouri: *Donovan v General Motors Corp*, 762 F2d 701, 705 (8th Cir 1985) (applying Missouri law); Montana: *Shannon v Howard S Wright Constr Co*, 36 Mont 632, 636; 593 P2d 438, 441 (1971); Nebraska: *Petznick v United States*, 575 F Supp 698, 704 (D Neb 1983) (applying Nebraska law); New Hampshire: the particular provision has not been the subject of review by the Supreme Court but in *Wise v Kentucky Fried Chicken Corp*, 555 F Supp 991, 995 (D NH 1983), the District Court "Erie-guessed" that New Hampshire would adopt the rule; New Jersey: *Bergquist v Penterman*, 46 NJ Super 74; 134 A2d 20, 26-27 (1957); New Mexico: *DeArman v Popps*, 75 NM 39; 300 P2d 215, 219 (1965); *see also, Moulder v Brown*, 98 NM 71; 644 P2d 1065, 1066 (NM Ct App 1982); North Dakota: *Ackerman v Gulf Oil Corp*, 555 FSupp 93, 96-97 (D ND 1982) (applying North Dakota law); Pennsylvania: *Byrd v Merwin*, 456 Pa 516; 317 A2d 280 (1974); *see also, Draper v Airco, Inc*, 580 F2d 91, 101-102 (3rd Cir 1978) (applying Pennsylvania law); Rhode Island: *see, Pastorelli v Associated Engineers, Inc*, 176 F Supp 159 (D RI 1959); South Dakota: *Blumhardt v Hartung*, 283 NW2d 229, 239 (SD 1979); *see also, Mickelson v Northern Plains Natural Gas Co*, 644 F Supp 630 (D Neb 1986) (applying South Dakota law); Texas: *Redinger v Living, Inc*, 689 SW2d 415, 418 (Tex 1985); Washington: *Kelley v Howard S Wright Const Co*, 90 Wash 2d 323; 582 P2d 500, 505 (1978); Wyoming: *Jones v Chevron USA, Inc*, 718 P2d 890, 895-897 (Wyo 1986).

E. THE RULE OF LAW STATED IN *FUNK v GENERAL MOTORS CORP*, 392 Mich 91; 516 NW2d 641 (1974) IS A DISTINCT THEORY OF RECOVERY IN MICHIGAN AGAINST THE PRINCIPAL WHO IS A "CONTROLLING EMPLOYER"

In *Bohnert v Carrington Homes, Inc,* a companion case to *Groncki v Detroit Edison Co,* 453 Mich 644, 662; (1996), Chief Justice James Brickley, writing for a majority of this Court, said this:

> Thus, for there to be liability under *Funk,* there must be: 1) a general contractor with supervising and coordinating authority over the job site, 2) a common work area shared by the employees of more than one subcontractor, and 3) a readily observable and avoidable danger in that common work area, 4) that creates a high degree of risk to a significant number of workers.

Recently, the Michigan Court of Appeals held that, for analytical purposes under *Funk v General Motors Corp, supra,* there is no difference between a construction manager and a general contractor. *Berry v Barton Malow Co,* 2003 Mich App LEXIS 1741 (July 22, 2003), **12, 13.

Second, in order to establish the existence of a common work area, "[t]he worker's burden does not... require proof that a particular girder or platform was used by employees of another contractor." *Plummer v Bechtel Construction Co, supra*, 440 Mich at 666. Indeed, "it is unnecessary for other subcontractors to be working at the site on the day of the accident for a location to be a common work area. All that is required is that two or more contractors will eventually work in the area." *Johnson v Turner Construction Co,* 198 Mich App 478, 481; 499 NW2d 27 (1993) [citation omitted]. In *Bohnert v Carrington Homes, Inc, supra,* the plaintiff's decedent not only represented the only *craft* present at the job site, he was the only *person* present, and this Court held that the issue of common work area was a question of fact for the jury. And, ordinarily, whether or not an area is a common work area is a question of fact for the jury. *Ormsby v Capital Welding, Inc, supra.*

This rule of common law is reflective of not only the administrative scheme for regulating construction safety, *see,* 29 CFR § 1926.16(b-c); State of Michigan, Department of Consumer & Industry Services, Bureau of Safety & Regulation, Construction Safety Division, Memorandum CS-MEW-25: Procedures: Multi-Employer Worksite (April 5, 1982) [*See,* Exhibit A, attached and annexed hereto], but it also mirrors the safety standards in the industry. American National Standards Institute (ANSI), *American National Standard Construction and Demolition Operations—Safety and Health Program Requirements for Multi-Employer Projects,* ANSI A10.33-1992 (1992) [*See,* Exhibit B, attached and annexed hereto].

IV. CONCLUSION AND RELIEF REQUESTED

This Court should affirm the Court of Appeals in both *Ormsby v Capital Welding, Inc, supra,* and *DeShambo v Anderson, supra.* In doing so, this Court ought to adopt the *Ormsby* Court's recognition that the "retained control" doctrine, and liability under *Funk v General Motors Corp, supra,* are functionally separate rules of law. In *DeShambo,* this Court ought to reaffirm the longstanding rule in Michigan that the employees of the employed contractor are entitled to the protection of the law embodied in the "inherently dangerous work" doctrine, and more in need of it. However, this Court ought to sound the death knell for the *Szymanski, supra,* paradigm, and reaffirm the definition of "inherently dangerous work" from *Bosak, supra.*

Respectfully submitted,

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DATED: February 10, 2004

EXHIBIT A

State of Michigan
Department of Consumer & Industry Services
Bureau of Safety & Regulation

CS-MEW-25

CONSTRUCTION SAFETY DIVISION

PROCEDURES	MULTI-EMPLOYER WORKSITE

PURPOSE:

This procedure outlines the format that the Construction Safety Officers will follow for recommending citations on Multi-Employer Worksites.

GENERAL INSTRUCTIONS:

WHO:	DOES WHAT:
Safety Officer	1. During the walk-around on an inspection or at the Closing Conference when an employer is made aware of a hazard, if the employer claims he has no authority to correct the hazard(s) such as, but not limited to, guardrail installation, grounding of temporary electrical supply lines, house-keeping, etc., the following procedure is to be followed:
	2. Will ascertain if:
	a. The employer did not create the hazard(s).
	b. The employer did not have the authority or the ability to correct the hazard.
	c. The employer made an effort to persuade the controlling employer to correct the hazard. How this was done and the date it was done.
	d. The controlling employer acknowledges that the exposing employer did provide notification of the hazard.
	e. The employer has instructed and where necessary, informed employees how to avoid or minimize the dangers associated with the hazardous conditions and where feasible, has taken alternate means of protecting employees from the hazard short of walking off the job (except when special circumstances require such extreme action).
	3. Document all of the above items on Contact/Compliance Report. In all cases governed by this instruction, the notice referred to in #2 (c) and (e) must have been related to the specific hazard(s) involved. Generalized notices of hazards given by one contractor to another or to employees are expressly deemed inadequate to avoid citations under this instruction.
	4. If all the above conditions (a thru e) are met, the exposing employer will not be cited. The citation shall then be issued to the employer who is in the best position to correct the hazard or to assure its correction (the controlling employer). In such circumstances the controlling employer may be cited even though no employees of that employer are exposed to the violative condition.

DEPOSITION EXHIBIT
16 VSmith
8-12-03

PROCEDURES

MULTI-EMPLOYER WORKSITE

Safety Officer

5. The exposing employer will not be able to establish a defense to a citation unless he has followed the steps in 2 (a)(b)(c)(e) and the controlling employer has acknowledged notice of the hazard. When he has not done so, the exposing employer will be cited.

6. If the exposing employer follows step 2 (c), however fails to follow steps 2 (a)(b)(e), both employers shall be cited.

7. If the exposing employer is cited because step 2(c) has not been followed, a written recommendation shall be issued at the time of the inspection to the controlling employer stating that if the condition is not corrected, that a citation may be issued as a result of a follow-up inspection if the hazard is not corrected.

   The recommendation shall state:

   Based upon the information available to the Department, you are the controlling employer responsible for correction of conditions pertaining to violations of the (name the standard). It is recommended that the following violations be corrected on or before (date). Failure to correct these violations may subject you to a willful citation at the time of follow-up inspection. (Add rule number and description of violation, the same as it would appear on a citation).

Assistant Chief

8. Received a copy of recommendation issued to controlling employer. Make a determination on the assignment of a follow-up inspection to the safety officer.

Safety Officer

9. Shall conduct a follow-up inspection on recommendation issued to controlling employer. If hazardous condition has not been corrected, a citation shall be issued to the controlling employer.

10. In a very limited number of situations, it may be impossible, on the basis of the facts available, to determine whether the exposing employer or controlling employer meets the tests outlined in Step 2 (c)(d). In such situations the exposing employer will be issued the citation and the controlling employer will be given the recommendation.

The effective date of this procedure is April 5, 1982.

Examples of Potential MIOSHA Enforcement on Multi-Employer Work Sites

Multi- employer Work sites. On multi employer Work sites, more than one employer may be citable for the same condition. The following employers are potentially citable:

(1) ***The Exposing Employer.*** An employer whose own employees are exposed to the hazard.

(a) The exposing employer must protect its employees from the hazard. If the employer has the authority to correct the hazard, it is citable if it failed to exercise reasonable care to correct it. The reasonable care standard for the exposing employer is very high: it must frequently and carefully inspect to prevent hazards and must correct hazards found promptly.

(b) If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to take all feasible measure to: minimize the hazard, minimize its employees' exposure to the hazard, and ask the controlling employer to get the hazard corrected. In extreme circumstances (e.g., imminent danger situations), the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

(2) ***The Creating Employer***. The employer who created the hazard.

(a) ***Example:*** A contractor hoisting materials onto a floor damages perimeter guardrails. None of its own employees are exposed to the hazard, but employees of other contractors are exposed.

(b) ***Analysis:*** This creating employer is citable if it failed to take immediate steps to keep all employees, including those of other employees, away from the hazard and to notify the controlling contractor of the hazard. If it had the authority to repair the guardrails, it is also citable if it failed promptly to correct the hazard.

(c) ***Example:*** An excavating contractor digs a trench with a backhoe, never entering the trench. It fails to install cave-in protection as it was required by contract to do and leaves the site. The next day employees of a plumbing contractor enter the unprotected trench.

(d) ***Analysis:*** The excavating contractor is citable because it created the hazard even though none of its employees were exposed to the hazard. The plumbing contractor is citable as an exposing employer.

(3) ***The Correcting Employer***. An employer who is responsible for correcting a hazard.

(a) ***Example:*** A carpentry contractor is hired to erect and maintain guardrails

throughout a project. None of its own employees are exposed to the hazard, but other employees are exposed where the guardrails are missing or damaged.

(b) *Analysis:* This correcting employer is citable if it failed to exercise reasonable care in its efforts to install and repair guardrails and to discover missing or damaged guardrails.

(c) *Note:* Exposing, creating and controlling employers can also be correcting employers if they are authorized to correct the hazard.

(4) ***The Controlling Employer.*** An employer who has control over the exposing, creating or correcting employer. To be citable as a controlling employer, the employer must have sufficient control and must have failed to exercise reasonable care in preventing, discovering or correcting the hazard.

(a) Sufficient Contractual Control.

(1) By a Specific Contract Right to Control Safety: To be a controlling contractor, the employer must be able to require a subcontractor to prevent or correct a violation. One source of this ability is contract authority. This can take the form of a specific contract right to require a subcontractor to adhere to safety and health requirements.

(2) By a Combination of other Contract Rights: Where there is no specific contract provisions granting the right to control safety or where the contract says the employer does not have such a right, an employer may still be a controlling employer. The ability of an employer to control safety in this circumstance can result from a combination of contractual rights that together, give it broad responsibility at the site involving almost all aspects of the job, including aspects that affect safety.

(3) **Example:** Some of the contractual rights that typically combine to result in this authority include: the rights to set schedules and constructions sequencing, require contract specifications to be met, negotiate with trades, resolve disputes between subcontractors and direct work or make purchasing decisions that affect safety. Where the combination of rights results in the ability of the employer to direct actions relating to safety, the employer is considered a controlling employer.

(b) Sufficient control without contractual authority

(1) Even where an employer has no contract rights with respect to safety, and employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site.

(2) **Example:** A construction manager does not have specific contractual authority to require subcontractors to comply with safety requirements. However, it exercises control over most aspects of the subcontractors'

work anyway, including aspects that relate to safety. This construction manager would be considered a controlling employer and would be citable if it failed to exercise reasonable care in over seeing safety.

(c) Reasonable care

(1) A controlling employer normally shall be cited if it failed to exercise reasonable care in preventing or correcting a violation.

(2) The reasonable care standard for a controlling employer is not as high as it is for an exposing, creating or correcting employer.

(i) This means that the controlling employer is not normally required to inspect as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the subcontractor.

(ii) Factors that affect how frequently and closely a controlling contractor must inspect to meet its standard of reasonable care include the scale of the project, the nature of the work, how much the general contractor knows about both the safety history and safety practices of the subcontractor and about the subcontractor's level of expertise.

(3) **Example:** A general contractor hires an electrical subcontractor. The electrical subcontractor installs an electrical panel box exposed to the weather and implements an assured equipment grounding conductor program, as required under the contract. It fails to connect the grounding wire inside the box to one of the outlets. This incomplete ground is not apparent from a visual inspection. The general contractor inspects the site twice a week. It saw the panel box but did not test the outlets to determine if they were grounded because the electrical contractor represents that it is doing all of the required tests on all receptacles. The general contractor knows that the subcontractor has a good safety program. From previous experience it also knows that the subcontractor is familiar with the applicable safety requirements and is technically competent. It had asked the subcontractor if the electrical equipment is OK for use and was assured that it is.

(4) **Analysis:** The general contractor exercised reasonable care. It had determined that the subcontractor had technical expertise, safety knowledge and used safe work practices. It also made some basic inquiries into the safety of the electrical equipment. Under these circumstances it was not obligated to teat the outlets itself to determine if they were all grounded. It would not be citable for the grounding violation.

EXHIBIT B

AMERICAN NATIONAL STANDARD

American National Standard Construction and Demolition Operations – Safety and Health Program Requirements for Multi-Employer Projects

National Safety Council

ANSI

ANSI®
A10.33–1992

AMERICAN NATIONAL STANDARD CONSTRUCTION AND DEMOLITION OPERATIONS— SAFETY AND HEALTH PROGRAM REQUIREMENTS FOR MULTI-EMPLOYER PROJECTS

Secretariat

National Safety Council

Approved February 6, 1992

American National Standards Institute, Inc.

AMERICAN NATIONAL STANDARD

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Published by
National Safety Council
1121 Spring Lake Drive
Itasca, Illinois 60143-3201

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CONTENTS

FOREWORD

This Foreword is not part of American National Standard Safety and Health Program Requirements for Construction and Demolition Operations for Multi-Employer projects, ANSI A10.33-1992.

Investigations of major construction failures and individual injuries indicate that in a majority of instances a lack of coordination between the owner, construction manager, general contractor and/or subcontractors was a primary contributing factor. In addition, studies by Stanford University and the Business Roundtable, have established that designation of a single individual to have overall authority and responsibility for the execution of the construction project is essential to ensure the safety of the employees and quality of workmanship.

Responsible owners and contractors require that all contractors and employees comply with at least a minimum number of policies and procedures in addition to more detailed requirements developed specifically for each project. The provisions contained in this standard are a composite of the most effective policy and program elements taken from examples provided by the industry.

This standard is a basis for each owner and contractor to use as a minimum program in developing and implementing safe, cost effective construction projects. It is one in a series of safety standards formulated by the Accredited Standards Committee on Safety in Construction and Demolition Operations, A10. It is expected that the standards will find a major application in industry, serving as a guide to contractors, labor and equipment manufacturers. For the convenience of the users, the existing and proposed standards in the A10 series are listed below:

A10.3	Powder-Actuated Fastening Systems
A10.4	Personnel Hoists and Employee Elevators
A10.5	Material Hoists
A10.6	Demolition
A10.7	Commercial Explosives and Blasting Agents—Safety Requirements for Transportation, Storage, Handling and Use
A10.8	Scaffolding
A10.9	Concrete Construction and Masonry Work

These standards should serve as guides to governmental authorities having jurisdiction over subjects within the scope of the A10 Committee. If these standards are adopted for governmental use, the reference of other national codes or standards in individual volumes may be changed to refer to the corresponding regulations of the governmental authorities.

All requests for interpretation of the language of the Committee's approved American National Standards must be in writing and directed to the secretariat. The A10 Committee shall approve the interpretation before a response is sent to the inquirer. No one but the A10 Committee is authorized to provide any interpretation of this standard.

The A10 Committee solicits comments on and criticism of the requirements of the standards. The standards will be revised from time to time to provide for new developments in the industry and in equipment. Suggestions for improvement of this standard will be welcome. All requests for interpretation and all suggestions for improvement should be sent to the A10 Committee, National Safety Council, 1121 Spring Lake Drive, Itasca, Illinois 60143-3201.

This standard was processed and approved for submittal to ANSI by the American National Standards Committee on Safety in Construction and Demolition Operations. A10 Committee approval of the standard does not necessarily imply (nor is it required) that all committee members voted for its approval. At the time it approved this standard, the A10 Committee had the following members:

Matthew J. Burkart, Chairman
Jim E. Lapping, Vice Chairman
Phil Schmidt, Secretary

Organizations Represented	Names of Representatives
ABB-Combustion Engineering, Inc.	Richard E. Peterson
	H. K. Dean (Alt)
Aegis Corp.	Matthew J. Burkart
Alcoa Construction	E. V. Dembiczak
	P. C. Dargan (Alt)
Allegheny Power System	Philip L. Stewart
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Alliance of America Insurers	Paul J. Leary
	Robert J. Gosnell
American Concrete Institute	Peter D. Courtois
	S. J. Henry (Alt)
American Federation of Labor—Congress of Industrial Organizations	Jim E. Lapping
American Institute of Architects	H. W. Eisenberg
American Institute of Steel Construction	Ron Davis
American Insurance Service Group, Inc.	Gerald E. Lingenfelter
	Tom Murray (Alt)
American Society of Safety Engineers	Ernest B. Jorgenson, Jr.
	J. P. O'Donovan (Alt)
American Subcontractors Association	Wayne Ruth
	Jane Dudley (Alt)
Asbestos Worker International Union	John Keane
Associated Builders and Contractors	Dennis Cuddy
	Richard Maresco (Alt)
Barton-Malow Co.	John Gleichman
Black & Veatch	Richard K. King
	Gary Buffington (Alt)
Building & Construction Trades Department	Leslie Murphy
Colonna's Shipyard, Inc.	Oscar F. Smith, IV
Construction Industry Manufacturers Association	William E. Miller
Edison Electric Institute	R. M. H. Terrier
	M. C. Linn (Alt)
E.I. Du Pont de Nemours & Co.	D. A. Gaddy
Engineering Contractors Association	Tom Malloy
Human Factors Society	Lewis C. Barbe
Industrial Safety Equipment Association	Frank E. Wilcher
	T. G. Augherton (Alt)
Inspeco, Inc.	Ronald Latanzio
	Paul Bonfiglio (Alt)
Institute of Makers of Explosives	Roger N. Prescott
	Thomas P. Dowling (Alt)
International Association of Bridge Structural & Ornamental Workers	Stephen D. Cooper
	Bernard Puchalski (Alt)
International Brotherhood of Boilermakers	Perry Day

Organizations Represented	Names of Representatives
International Brotherhood of Electrical Workers	Charles Fisher Robert Gagotti (Alt)
International Union of Operation Engineers	A. Bennett Hill, Jr. Don Carson (Alt)
Iowa State University Joint Trade Board	Jack Mickle Frank D. Tooze James D. Bishop (Alt)
Laborers International Union of North America	John Moran Vito Russo (Alt)
Mechanical Contractors Association of America	Jack Hansmann William Abernathy (Alt)
Miller Equipment	Carl D. Wible Robert Stamp (Alt)
Morley Brickman & Associates, Ltd. National Association of Dredging Contractors National Association of Governmental Labor Officials National Association of Home Builders National Constructors Association	Morley Brickman Gil Miller John Brooks
National Electrical Contractors Association	Michael P. O'Brien Kenneth A. Paradis S. C. Burkhammer (Alt)
National Erectors Association	Charles Williams William J. Normand (Alt)
National Roofing Contractors Association	William Treharne S. C. Burkhammer (Alt)
On-Site Health Services, Inc.	Tom Shanahan Carl Good (Alt)
Operative Plasters and Cement Masons	Judith A. Paul Sue Kennedy (Alt)
Pitts-Des Moines, Incorporated	Richard Gonzales Robert J. Holtman (Alt)
Power Consultants, Inc.	Thurman E. Yost, Sr. Jerry Johnsen (Alt)
Professional Safety Consultants, Inc. Scaffolding, Shoring and Forming Institute	David H. Goldsmith Garry Williams (Alt) Clyde W. Farrar, Jr. Richard C. Mocny
Sheet Metal Workers Sigma Associates Ltd.	Joseph Puccinelli (Alt) Jerry Olejniczak A. J. Scardino, Jr.
Sinco, Inc.	Donald J. Godlewski (Alt) Daniel M. Paine
Smith Swanson-Nunn Electric Company	Barry Cole (Alt) George E. Smith Jack Buttrum Kathy Stieler (Alt)

Organizations Represented	Names of Representatives
The Associated General Contractors of America	Paul A. King
	Pete Chaney (Alt)
The L. E. Myers Co.	Charles Popke
	Darrell Davis (Alt)
The Peoples Gas, Light & Coke Company	Glen Armstrong
	Don Miller (Alt)
The Taylor Companies	Randy Krueger
United Association	Joe A. Adam
United Brotherhood of Carpenters & Joiners of America	Joseph L. Durst
United Union Roofers, Waterproofers & Allied Workers	Robert J. Krul
	Joseph Wiederkehr (Alt)
United States Department of the Army	James T. Patton
	Michael G. Vogt (Alt)
United States Department of Commerce—National Institute of Standards & Technology	H. S. Lew
United States Department of Labor—OSHA	Roy Gurnham
United States Environmental Protection Agency	Anthony .D. Brown
	James Makris (Alt)
Washington State Department of Labor and Industries	Ray Wax
	Jack Scherer (Alt)
Wire Rope Technical Board	L. D. Means
Zeise	Ingo Zeise
Zurn Industries	Jeffrey D. Meddin

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Joseph L. Durst	Mike J. Pennington
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Richard King	Tom West

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AMERICAN NATIONAL STANDARD CONSTRUCTION AND DEMOLITION OPERATIONS—SAFETY AND HEALTH PROGRAM REQUIREMENTS FOR MULTI-EMPLOYER PROJECTS

1. GENERAL

1.1 Scope. This standard sets forth the minimum elements and activities of a program that defines the duties and responsibilities of construction employers working on a construction project where a single Project Constructor supervises and controls the project.

1.2 Purpose. This standard is a basis for use as a minimum program to provide a safe and healthful work environment, and to accomplish cost effective construction.

1.3 Modifications and Exemptions. All modifications to and/or exemption from this standard shall be approved in writing by the Project Constructor.

2. DEFINITIONS

construction project. All construction work performed by or for the owner as contained in the Project Documents.

competent person. One who is capable of identifying existing and predictable hazards in surroundings which are unsanitary, hazardous, or dangerous to employees, and who has the authority to take prompt corrective measures to eliminate them.

contractor. A subcontractor, specialty contractor or other entity as designated in the project documents, responsible for part of the construction process on a construction project.

contractor safety and health program. A written program developed by the Contractor specifically for the work to be performed on the job site by the Contractor. The Program meets the requirements established by the Project Safety and Health Program, and covers all activities and conditions under the responsibility of the Contractor.

licensed professional. One whose services are required for a specific action by statute.

project constructor. A person, firm, or corporation, i.e. the Construction Manager, General Contractor, Prime Contractor or other entity, as designated in the project documents, responsible for supervising and controlling all construction work performed on the project.

project documents. All contract documents, work orders, permits, requisitions and agreements applicable to the construction project.

project safety and health program. The written program developed by the Project Constructor specifically for the project that describes the requirements and procedures for implementing an employee safety and health

program. This program applies to all Contractors and/or individuals.

senior contractor supervisor. The individual designated by the Contractor who has overall authority and responsibility for work performed by that Contractor, including the Contractor Safety and Health Program.

senior project supervisor. The individual designated by the Project Constructor with final authority and overall responsibility for all construction and related activities, including the Project Safety and Health Program.

3. PROJECT SAFETY AND HEALTH REQUIREMENTS

3.1 Implementation.

3.1.1 The project documents shall include a requirement that this standard and all applicable federal, state and local safety and health laws and regulations shall be complied with by all Contractors, subcontractors, sub-tier Contractors and suppliers performing work on the project. Where there is a conflict, the more stringent provisions shall prevail.

3.1.2 When the planned construction employee peak exceeds 100, this standard shall apply from the start of the project—otherwise, it is optional.

3.2 Responsibilities and Authority.

3.2.1 The Project Constructor shall have a Safety and Health Program specific for the scope of work to be performed.

3.2.2 This program shall include a description of the responsibilities and authority of all levels of supervision.

3.2.3 Contractors are responsible for developing, implementing, monitoring and enforcing their Safety and Health Program, unless these requirements are performed by a higher tier Contractor.

3.3 Combined Responsibilities. Several responsibilities may be performed by the same individual, providing this is a Competent Person(s) approved by the Senior Project Supervisor.

3.4 Program Assignments. The following shall be specified in the Project Safety and Health Program, and be assigned to the various levels of construction management and supervision with authority and capabilities to implement the program:

3.4.1 Evaluation of Contractor Safety and Health Programs to determine their appropriateness to the specific job site and work to be performed;

3.4.2 Monitoring and documenting the implementation of Safety and Health Programs;

3.4.3 Maintenance of accurate and complete accident, injury and illness records;

3.4.4 Maintenance of a Safety and Health Record/Log.

3.5 Assessment of Qualifications. The Project Constructor shall be responsible for assessing the qualifications and performance of the Senior Project Supervisor and the Senior Contractor Supervisor.

3.6 Hazard Reporting. Written reports describing noncompliance with safety and health standards, Project Safety and Health Programs and hazardous conditions shall be submitted to the Senior Project Supervisor. Imminent danger conditions shall be reported to the Senior Project Supervisor for immediate correction. The Project Constructor will establish a procedure for receiving these reports.

3.7 Special Safety and Health Plan.

3.7.1 When a Contractor has established a pattern of noncompliance with the Project Safety and Health Program and/or laws and regulations, the Contractor shall develop a Special Safety and Health Plan detailing procedures to correct and prevent future occurrences of noncompliance.

3.7.2 The plan shall be approved and monitored by the Senior Project Supervisor.

3.8 Monthly Status Report.

3.8.1 A safety and health status report shall be completed on a monthly basis. The report shall reflect the current status of the project and shall be signed by at least the Senior Project Supervisor.

3.8.2 Copies of the monthly updated report shall be posted at locations readily accessible to all supervisors and employees.

3.9 Critical Structures and Complex Processes. The Project Constructor shall determine whether the project or parts of the project are critical structures or complex processes that require planning, design, inspection and/or supervision by a licensed professional (see definition).

4. DISCIPLINARY PROCEDURES

The Project Constructor shall establish disciplinary policy and procedures for Contractors, supervisors and employees not complying with the Project Safety and Health Program.

5. SENIOR PROJECT SUPERVISOR

5.1 Designation. The Project Constructor shall designate the Senior Project Supervisor who shall have final authority and responsibility for the Project Safety and Health Program.

5.2 Responsibilities. In addition to other responsibilities required by this standard, for all work to be performed on the project, the Senior Project Supervisor shall:

5.2.1 Ensure correction or abatement of all hazardous conditions and compliance with this standard;

5.2.2 Determine that Competent Persons are designated by Contractors;

5.2.3 Monitor regularly for potentially hazardous conditions;

5.2.4 Immediately notify the responsible Contractor of any conditions/acts that may cause illness or injury to employees;

5.2.5 Maintain a Project Safety and Health Record/Log by documenting the daily occurrences related to the Project Safety and Health Program including:

(a) All injury, illness and accidents for the entire project with sub-records of same on each Contractor;

(b) A current list of all Senior Contractor Supervisors;

(c) The status of safety-related permits;

(d) All other information/reports related to the implementation of this standard.

5.3 Corrective Action. If a Contractor fails to correct hazardous conditions, or continues to place employees in hazardous conditions, the Senior Project Supervisor shall notify the Project Constructor for corrective action. Where imminent danger exists, the Senior Project Supervisor shall take appropriate action, which may include suspending operations in the affected area.

5.4 Presence on Project. No work shall be performed on the project unless the Senior Project Supervisor or designated representative(s) is present on the project.

6. SENIOR CONTRACTOR SUPERVISOR

6.1 Designation. Each Contractor shall designate a Senior Contractor Supervisor who shall have final authority and responsibility for the Contractor Safety and Health Program.

6.2 Responsibilities. In addition to other responsibilities required by this standard, for all work to be performed by the Contractor, the Senior Contractor Supervisor, or designated representative(s) shall:

6.2.1 Ensure compliance with this standard and correction or abatement of all hazardous conditions;

6.2.2 Approve Competent Persons;

6.2.3 Audit Contractor safety and health documents at least on a monthly basis;

6.2.4 Determine whether any work being performed by the Contractor requires planning, design, inspection and/or supervision by a licensed professional (see definition);

6.2.5 Conduct or cause to have conducted daily inspections, and document and correct all observed or potentially hazardous conditions and noncompliance with this standard;

6.2.6 Report and document all injuries, illnesses and accidents; investigate and implement measures to prevent recurrence.

6.3 Corrective Action. The Senior Contractor Supervisor shall stop hazardous work and notify the Senior Project Supervisor of all hazardous conditions and noncompliance with this standard not within the control of the Senior Contractor Supervisor.

6.4 Presence on Project. No work shall be performed by the Contractor unless the Senior Contractor Supervisor or designated representative is present on the project.

7. CONSTRUCTION PROCESS PLAN

7.1 Development. The Construction Process Plan shall describe the construction sequence and procedures including temporary structures, shoring and bracing to be followed for the safe construction of the project.

7.2 Test Check List. There shall be a checklist of required tests including a timetable and list of those responsible for conducting the tests and/or approving continued construction based

on the test results, as part of the Construction Process Plan.

8. PRE-WORK PLANNING

8.1 Project Survey. Prior to the start of work, each Contractor shall conduct a physical survey of the job site and make a survey of the work to be performed by reviewing the drawings and conducting discussions as applicable with one or more of the following—the Owner, Engineer, General Contractor and Construction Manager.

8.2 Hazard Analysis. At the initiation of a construction project and for critical stages of work, a hazard analysis shall be conducted and implemented describing potential hazards and actions required to provide a safe and healthful work place. (See Appendix A.)

8.3 Pre-Phase Planning Meeting. A meeting of affected Contractors shall be held to coordinate and assign responsibility for all items identified in the hazard analysis.

9. EMERGENCY PLAN

The Project Constructor shall prepare a project-specific emergency plan and communication system that describes procedures to be followed in the event of serious injuries, fatalities, structural failures and other emergencies.

10. PERMIT SYSTEM

Where required by the Construction Process Plan, all Contractors shall obtain a permit issued by the Senior Project Supervisor or designated representative, authorizing work to be performed on scaffolds, in trenches, in confined spaces and under other hazardous conditions designated by the Senior Project Supervisor.

11. NOTIFICATION

The Project Constructor shall assure that each employee and supervisor is provided a summary (preferably pocket-size) of the Project Safety and Health Program.

12. TRAINING

12.1 Responsibility. Contractors shall be responsible for the safety and health training of their employees to assure that a safe and healthy work place exists.

12.2 Types of Training.

12.2.1 Supervisory. Employees assigned to supervisory positions shall be trained to carry out the safety and health responsibilities of the positions to which they are assigned and as outlined elsewhere in this standard.

12.2.2 Employee. Training in safety and health requirements shall be provided to each non-supervisory working employee. Training programs of these types should be utilized:

(a) New Hire Orientation—Training for newly hired employees oriented towards the Contractor's safety and health policies and Safety and Health Program and rules.

(b) Job Specific Training—Training in safety and health requirements and rules specific to the necessary knowledge, skills and abilities required to safely perform the work.

(c) Site-Specific Training—Training in safety and health requirements and rules unique to the particular work site.

(d) Safety Meetings—Training conducted on a regularly scheduled periodic basis during the progress of the work to reinforce requirements of the Safety and Health Program, review compliance and incidents or near misses caused by noncompliance and establish procedures for present or upcoming activities.

APPENDIX A

JOB HAZARD ANALYSIS

1. Scope

This suggested procedure will outline the purpose for job hazard analysis for safe work operations and the method of pre-phase planning.

2. Purpose

Accident prevention preplanning identifies hazards that are likely to occur during construction and makes sure that each Contractor performing an operation will have the necessary material and equipment on hand when needed. Due to the speed at which construction jobs proceed, time does not allow a single operation to continue long enough to become safe through trial and error. Pre-phase planning will enable the Contractor to anticipate the hazards and develop an appropriate plan to prevent accidents.

3. Responsibility

It will be the responsibility of an individual designated by the Project Constructor to ensure that pre-phase job hazard analyses are conducted for work operations and activities performed by the Contractors.

(a) Pre-phase job hazard analysis should be developed by the Contractor field supervisory personnel who will actually be running the job that is being preplanned. The attached job hazard analysis form can be used for this analysis.

(b) The Project Constructor should consult and coordinate with Project Contractors in the preparation of pre-phase plans to ensure their acceptability. In addition, the plans should be reviewed and updated at reasonable periods of time to reflect changes in hazards and job conditions.

4. Pre-Phase Meeting

After the Contractors have completed their necessary preparations and have a pre-phase job hazard analysis written out on the attached form or another acceptable form, the Contractors should call a pre-phase meeting. This meeting should be attended by the Contractors submitting the plans, the Project Constructor, and the Senior Contractor Supervisors responsible for that particular phase of work.

Copies of the written plan should be distributed to all persons present, and the originator of the plan should explain each item and allow time for comments from all present. When appropriate, employees involved with these operations should be consulted. After the final decision to accept the plan as written or revise the submitted plan, it should be discussed with the employees who will perform the work. Under no circumstances should work be allowed to begin without first going through this procedure and having the job hazard analysis approved by the Project Constructor.

Page _____ of _____

JOB HAZARD ANALYSIS

Date _____

Contract No._____

Phase No._____

Contractor _____

Location _____

ACTIVITY/OPERATION	*UNSAFE CONDITION, ACTION OR HAZARD*	*PREVENTATIVE OR CORRECTIVE ACTION*

APPENDIX B

MONTHLY STATUS REPORT
A10.33-1

Month	Year

*Project Injury/Illness Rate

Name of Project

Project Owner/Representative — Jobsite Telephone

Senior Project Supervisor — Jobsite Telephone

Project Safety and Health Manager — Jobsite Telephone

OSHA Area Office Telephone

Contractor/Subcontractor	Senior Contractor Supervisor	Injury/Illness Rate

Reviewed by: Senior Project Supervisor — Date

*Total Recordable OSHA Cases x 200,000
Total Hours Worked

APPENDIX C

Project Safety and Health Forms

Sample Forms to Assist in the Implementation of
American National Standards Institute A10.33
Safety and Health Program Requirements

CONSTRUCTION PROCESS PLAN

1. Project_____Date_____

2. Prepared By _____

3. Construction Sequence and Procedures:

3.1 _____

3.2 _____

3.3 _____

3.4 _____

3.5 _____

3.6 _____

3.7 _____

3.8 _____

3.9 _____

3.10 _____

(Attach additional information if necessary)

4. Temporary Structures, Shoring and Bracing required:

4.1 _____

4.2 _____

4.3 _____

4.4 _____

4.5 _____

4.6 _____

4.7 _____

4.8 _____

4.9 _____

4.10 _____

CONSTRUCTION PROCESS PLAN - Cont'd

5. Critical Structures or Processes requiring professional design, planning, inspection and/or supervision:

5.1 _____

5.2 _____

5.3 _____

5.4 _____

5.5 _____

5.6 _____

5.7 _____

5.8 _____

5.9 _____

5.10 _____

6. Check List of Tests and Approvals:

6.1 _____

6.2 _____

6.3 _____

6.4 _____

6.5 _____

6.6 _____

6.7 _____

6.8 _____

6.9 _____

6.10 _____

(Attach additional sheets if necessary)

PRE-WORK PLANNING

1. **Project Survey**

1.1 Project Site Visit	1.2 Review Drawings	1.3 Meet with Project Team
_____	_____	_____
Initial & Date	Initial & Date	Initial & Date

2. **Hazard Analysis:**

Potential Hazard	Preventive Action	Responsible Supervisor
2.1		
2.2		
2.3		
2.4		
2.5		
2.6		
2.7		
2.8		
2.9		
2.10		

3. **Pre-Phase Planning Meeting**: Supervisor Attendance List

3.1 _____

3.2 _____

3.3 _____

3.4 _____

3.5 _____

3.6 _____

3.7 _____

3.8 _____

3.9 _____

3.10 _____

PROJECT SAFETY AND HEALTH RECORD/LOG

Project _____ Date _____

Senior Project Supervisor _____ Designated Representative _____

Daily Inspection Results

Date	Results

Attach Copies of:

(1) Hazardous Conditions Reports
(2) Injuries, illnesses and accident reports
(3) Active Permits
(4) Construction Process Plan
(5) Designated Competent Persons

PERMIT SYSTEM

PERMIT NUMBER	DATE ISSUED	DATE EXPIRES	PURPOSE	ISSUED TO	APPROVAL

PERMIT TO PERFORM WORK

Project	Permit Number
Issued To	Date Permit Issued
Designated Competent Person	Date Permit Expires

Permitted Activity:

Issued by Senior Project Supervisor

Received by Designated Competent Person

Hazardous Condition Report

Project _____ Date _____

DESCRIPTION	CORRECTIVE ACTION

Prepared By _____

Received by Senior Project Supervisor _____

Date _____

APPENDIX D

This Appendix is not a part of the American National Standard Safety Requirements for Safety and Health Program Requirements for Multi-employer Projects for Construction and Demolition Operations, ANSI A10.33–1992, but is included for information purposes only.

SURVEY OF JOB SITE

Construction and demolition workers are subjected to certain hazards that cannot be eliminated by mechanical means and must be controlled by care, common sense and intelligence. The A10 Committee realizes the importance of safety and strongly recommends that prior to commencing any operation, the employer make a survey of the conditions of the site to determine the hazards and the kind/number of safeguards that the employer will install. The survey should include, but not be limited to, the following:

(1) Safe access and movement
  (a) Work areas
  (b) Walkways, runways and passageways
  (c) Ladders, stairways and elevators
  (d) Protection for floor and roof openings
  (e) Illumination
(2) Vehicles
  (a) Roads
    (i) Turn space
    (ii) Parking area
    (iii) Mud areas
  (b) Materials storage areas/dump areas
  (c) Signs and signals to route vehicles
  (d) Maintenance and repair of vehicles
(3) Utilities and service
  (a) Location of temporary buildings
  (b) Location/identification of high-voltage lines (identify by signs; move, de-energize or erect a barrier to prevent contact)
  (c) Location of sanitary facilities and drinking water
(4) Scheduling work for safety
  (a) Providing items like hard hats, life belts, goggles and work vests on the job
  (b) Establishing liaison among Contractors to prevent congestion among trades
  (c) Providing temporary flooring, safety nets and scaffolding where required
(5) Work procedures
  (a) Space
  (b) Equipment such as cranes, hoists, elevators and trucks
  (c) Rigging procedures
(6) Tools and equipment
  (a) Repair, maintenance and care
  (b) Inspection
  (c) Supplies of tools for each job
(7) Workers and foremen
  (a) Job assignment
  (b) Training and supervision
  (c) Number of workers
  (d) Plans for maintaining interest in safety:
    (i) Safety bulletins, record charts and posters
    (ii) Recognition for groups and individuals
    (iii) Investigation and reporting on reportable accidents
    (iv) Knowledge of safety orders
    (v) Safety meetings
    (vi) Specific safety instructions for new employees

(e) **Establishment of provisions to take immediate action to correct unsafe conditions or acts**

(f) **First aid and medical treatment of injuries**

(8) **Safety meetings**

(a) **Establishment of provisions to take immediate action to correct unsafe conditions or acts**

(b) **First aid and medical treatment of injuries**

SPECIAL INSERT
TO
ANSI A10.33-1992 (R1998)

SAFETY AND HEALTH REQUIREMENTS
FOR
MULTI-EMPLOYER PROJECTS

Please note: This standard has been reaffirmed.
Reaffirmation Date: May 19, 1998

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